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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1990

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Petitioner,

v.

RANDY DALE MAYO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. IS THE RULE IN *PENRY v. LYNAUGH* VIOLATED WHERE A DEFENDANT PRESENTS AND ARGUES MITIGATING EVIDENCE SOLELY AS RELEVANT TO TEXAS' SPECIAL ISSUES ON PUNISHMENT AND DOES NOT REQUEST SPECIAL INSTRUCTION OR OTHERWISE EVINCE A DESIRE TO HAVE THE JURY CONSIDER MITIGATING VALUE, IF ANY, OF THE EVIDENCE BEYOND THE SCOPE OF THE ISSUES, SUCH THAT NO RATIONAL TRIAL JUDGE WOULD CONCLUDE THAT THE DEFENDANT WAS OFFERING THE EVIDENCE FOR A PURPOSE BEYOND THE SCOPE OF THE SPECIAL ISSUES?

II. DOES THE EIGHTH AMENDMENT REQUIRE A CAPITAL MURDER DEFENDANT, WHO INTRODUCES EVIDENCE SUCH AS CHILDHOOD ABUSE IN MITIGATION OF PUNISHMENT, TO DEMONSTRATE THAT THE CRIME IS ATTRIBUTABLE TO THE CIRCUMSTANCES URGED IN MITIGATION SUCH THAT THOSE CIRCUMSTANCES LESSEN HIS PERSONAL MORAL CULPABILITY FOR THE OFFENSE?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, Petitioner herein,[1] by and through his attorney, the Attorney General of Texas, and files this Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on January 23, 1990, rehearing denied on December 17, 1990.

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[1] For purposes of clarity, Petitioner will be referred to as "the state" and Respondent as "Mayo."

OPINIONS BELOW

The opinion of the court of appeals for which review is sought is reported at 893 F.2d 683 (5th Cir.), *reh'g denied*, 920 F.2d 251 (5th Cir. 1990) (Appendices A and B). The court of appeals' first decision on rehearing is reported at 883 F.2d 358 (5th Cir. 1989) (Appendix C), and the original opinion in the case is reported at 882 F.2d 134 (5th Cir. 1989) (Appendix D). The order of the United States District Court for the Northern District of Texas, San Angelo Division, adopting the report of the United States Magistrate, appears as Appendix E. The report of the Magistrate appears as Appendix F.

JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. §§ 2241, 2254. The judgment of the United States Court of Appeals for the Fifth Circuit on second rehearing was entered on January 30, 1990. A timely filed petition for rehearing was denied on December 17, 1990. This petition for writ of certiorari is filed within ninety days after final judgment in this case. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, amend. XIV, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

The state has lawful and valid custody of Mayo pursuant to a judgment and sentence of the 51st Judicial District Court of Tom Green County, Texas, in Cause No. 14,009-A, styled *The State of Texas v. Randy Dale Mayo*, in which Mayo was found guilty on January 28, 1985 of the capital offense of the murder of Kimberly Sue Reeves while in the course of committing and attempting to commit the offense of aggravated sexual assault. On January 31, 1985 after a separate hearing on the question of punishment, the jury returned affirmative answers to the special issues submitted pursuant to TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon Supp. 1991). Accordingly, the court assessed Mayo's punishment at death by lethal injection.

On direct appeal, the Texas Court of Criminal Appeals affirmed Mayo's conviction and sentence. *Mayo v. State*, 708 S.W.2d 854 (Tex. Crim. App. 1986). Mayo did not seek rehearing, nor did he petition this Court for writ of certiorari. The trial court subsequently scheduled Mayo's execution to take place before sunrise on August 13, 1986. On August 6, 1986, Mayo filed a motion for stay of execution, motion to recall the warrant of execution, and an application for writ of habeas corpus with the state convicting court. The Court of Criminal Appeals denied the motion for stay of execution and application for writ of habeas corpus on August 11, 1986. *Ex parte Mayo*, Application No. 16,251-01. Mayo then filed a motion for stay of execution and a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Northern

District of Texas, San Angelo Division, which granted a stay on August 11, 1986.

On November 18, 1986, the United States Magistrate conducted an evidentiary hearing. Prior to the beginning of the hearing, Mayo personally moved to amend his petition to assert claims of ineffective assistance of counsel. Because the attorney representing Mayo had been one of his trial attorneys, the allegations of ineffectiveness created a conflict of interest. Accordingly, the magistrate allowed counsel to withdraw, continued the hearing, and appointed new counsel to represent Mayo. The magistrate permitted Mayo's new attorney to amend the petition and held an evidentiary hearing on April 13, 1987. Before the case could be resolved, however, counsel was forced to withdraw from representing Mayo. A third attorney was appointed but refused the appointment and was removed. Finally, counsel was appointed and, after reviewing the record and the pleadings, agreed that nothing further needed to be filed and that the case was ripe for decision. On September 16, 1988, the magistrate issued his Report and Recommendation, finding no merit to Mayo's allegations and recommending that relief be denied. Thereafter, Mayo was granted leave to file an amended petition asserting a claim based on *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir. 1987), *cert. granted*, 487 U.S. 1233 (1988), *rev'd in part*, 492 U.S. ___, 109 S.Ct. 2934 (1989), that the Texas capital sentencing statute is unconstitutional. On February 1, 1989, the district court adopted the magistrate's findings and recommendation, found no merit to Mayo's challenge to the Texas capital sentencing statute, denied relief, ordered the petition dismissed, and vacated the stay of execution. *Mayo v. Lynaugh*, Civil Action No. CA6-86-0080.

On appeal, the Court of Appeals for the Fifth Circuit originally affirmed the denial of relief. *Mayo v. Lynaugh*, 882 F.2d 134 (5th Cir. 1989). The opinion had been written before this Court's decision in *Penry* was announced and, thus, did not discuss Mayo's claim in light of that opinion.

Both parties petitioned for rehearing, and the court of appeals again affirmed noting, first, that the claim was procedurally barred from review because Mayo had not objected to the punishment phase charge at trial and, second, that even were the merits to be reached, Mayo had not sufficiently articulated "how the jury was unable to express its reasoned moral response and give effect to his mitigating evidence." *Mayo v. Lynaugh*, 883 F.2d 358, 359-60 (5th Cir. 1989).

Counsel then withdrew from representing Mayo and new attorneys were appointed. They sought a second rehearing asserting that the state had waived its procedural default defense by not raising it until rehearing, and contending that Mayo's case came within the parameters of *Penry*. The state argued that the procedural defense had been asserted at the first opportunity and that, quite apart from any state procedural bar, an integral part of a *Penry* claim was giving notice to the trial court—either by objecting to the charge or proposing additional instructions—that the defendant perceived that his mitigating evidence could not be considered by the jury in answering the punishment issues. Further, the state contended that Mayo's mitigating evidence was not of the type that could not be considered under Texas' special punishment questions. The court of appeals granted rehearing and reversed. *Mayo v. Lynaugh*, 893 F.2d 683 (5th Cir. 1990). The state sought further rehearing, contending again that the jury could give effect to Mayo's evidence in answering the punishment questions. The court modified one portion of its previous opinion and denied rehearing. *Mayo v. Collins*, 920 F.2d 251 (5th Cir. 1990).

B. Statement of Facts

The facts of the offense are not relevant to the determination of the issues presented in this petition. They are accurately reported in the opinion of the Court of Criminal Appeals, as follows:

> On April 13, 1984, between the hours of 1:30 and 2:30 p.m., the body of the deceased was found next to the concrete supports of a bridge crossing over part of Lake Nasworthy in Tom Green County. Police found Ms. Reeves' automobile and personal belongings approximately 600 yards from the bridge supports. She appeared to have been sunbathing. She was last seen alive at approximately 10:30 a.m. on April 13 by students at Angelo State University in San Angelo. The body of the deceased, identified by her father, was transported to San Antonio for an autopsy. The autopsy revealed that Kimberly Sue Reeves died as a result of a blow to the skull and brain with a blunt instrument. It was further concluded by the medical examiner that neither of two stab wounds, one to the neck and one to the abdomen, would have caused death under ordinary circumstances. Examination of the vaginal cavity of the deceased indicated the presence of spermotazoa [*sic*].
>
> [Mayo] was seen driving later that same evening in San Angelo. He pulled his car into the Sonic Drive In and was arrested at approximately 8:45 p.m., pursuant to a warrant from Lubbock County for another crime.
>
> [Mayo] made two confessions to police, the validity of which are not before us for review. He also led police to an area where he had thrown the jack stand he used to crush the skull of the deceased.

Mayo v. State, 708 S.W.2d at 855-56.

In addition, at the punishment phase of the trial, the state introduced evidence of several extraneous offenses and acts of violence committed by Mayo. These included two instances of pointing guns at people and threatening to kill them (R. XIX:611, 785);[2] offering money to friends to lure Harry Richards, who had been dating Mayo's former girlfriend, to a place where Mayo could beat him up (R. XIX: 629-30, 639-40); entering the apartment of a friend with blood on his hands and telling her he had just killed Richards (R. XIX:655-56); assaulting an elderly man in a dispute over ownership of a truck (R. XIX:754-72); a 1982 robbery in California (R. XX:822-23); and the kidnapping of two young women at knifepoint in Greenville, Texas, in 1979 (R. XX:839-80). Further, a deputy sheriff from San Joaquin County, California, testified about Mayo's arrest and conviction for burglary in 1982 (R. XIX:796-810). A deputy sheriff from Hunt County, Texas, testified that he found a homemade knife in Mayo's cell during a shake-down while Mayo was a prisoner there in 1980 (R. XX:887-88). Two inmates from the Tom Green County Jail testified that Mayo had beaten them without provocation in the jail (R. XX:894-99, 912-17), and one of the inmates testified that Mayo had told him that Kimberly Sue Reeves was "a dumb bitch and that she had it coming" (R. XX:917-18). In addition, the state introduced evidence about the killing of Harry Richards which corresponded to the details Mayo had related to his friend (R. XIX:679-741). Finally, Dr. Richard Coons, a psychiatrist, responding to a hypothetical question, stated his opinion that "that hypothetical individual would commit criminal acts of violence in the future which would constitute a continuing threat to society" (R. XX:929-39).

Mayo called eight witnesses to testify in his behalf. Russell Shuey and J. C. Harrell testified that they knew Mayo personally and that they considered him to be generous,

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[2] "R." refers to the record of Mayo's trial, followed by the volume and page numbers.

a hard worker, and a person who was not violent (R. XX:953-63). Clifford Dennis and Larry Don Arnold, inmates in the Tom Green County Jail at the time of Mayo's trial, testified regarding the incidents in the jail, stating that Mayo had either acted in his capacity as a trusty or that he had been provoked (R. XX:965-81). In addition, his mother and an acquaintance testified about instances of abuse he had endured from his father when he was younger, and his mother identified a set of drawings he had done (R. XX:982-1020). His sister and another acquaintance testified that he was a good and loving person. His attorneys argued that Mayo's background and lack of a strong role model when he was growing up deprived him of the opportunity to develop into a responsible adult and that, with time, he would develop into such a person (R. XXI:1053-54), that Mayo was relatively young and likely to mature and not commit similar acts in the future (R. XXI:1050-51), that Mayo's artistic ability indicated that he was a person who had human feelings and sensibilities who could be rehabilitated (R. XXI:1069-70), and that predicting a person would be violent in the future was too uncertain to allow the jury to answer the second special issue "yes" (R. XXI:1049-52, 1060-66).

REASONS FOR GRANTING THE WRIT

I.

THERE ARE SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT.

The decision of the court of appeals conflicts with this Court's holdings in two ways. First, it allows a defendant to establish that the Texas capital sentencing statute precluded jury consideration of mitigating aspects of evidence that were not urged at the time of trial. This result is contrary to the holdings in *Penry v. Lynaugh*, 492 U.S. ___, 109 S.Ct. 2934 (1989) and *Boyde v. California*, ___ U.S. ___, 110 S.Ct. 1190 (1990). *Boyde* expressly held that a defendant

could not show an Eighth Amendment violation by contending on appeal that his evidence had mitigating value that could not be considered by the jury when the evidence had not been offered for that purpose at trial and the jury could have considered the evidence in the manner in which it was offered. *Boyde v. California*, ___ U.S. at ___ n.5, 110 S.Ct. at 1198 n.5. The decision in *Penry* was premised on the fact that a defendant would bring to the trial court's attention his belief that the jury could not consider some mitigating aspect of his evidence without an additional instruction. Because *Penry*'s result was dictated by *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), defendants such as Mayo had a constitutional basis for objecting if they perceived that the jury was being precluded from giving effect to evidence they offered in mitigation of punishment. Unless the defendant indicates differently, the trial court should not be required to presume that the evidence is being proffered for any mitigating value beyond the scope of the special issues, and should not be required to prepare a jury instruction that accomodates concerns that the defendant does not express. If allowed to stand, the court of appeals' decision will encourage defendants who are sentenced to death to manufacture mitigating aspects of their evidence years after conviction that were not recognized or urged at trial. In this case, for example, the mitigating value of the evidence of child abuse now being argued is entirely inconsistent with the manner in which Mayo argued at trial that his background militated against a death sentence. The decision of the court below, thus, will have the effect of rendering the trial an unimportant preliminary round before the main event of federal habeas corpus.

In granting Mayo relief, the court of appeals ignored this Court's decisions that the mitigating value of evidence such as mental or emotional problems, child abuse, or disadvantaged background depends on the extent to which the defendant can show that his crime is attributable to those experiences. Such evidence is constitutionally mitigat

ing only where it encompasses an aspect of the defendant's character or background that society believes to be mitigating and the defendant establishes a nexus between the crime and the circumstances offered in mitigation. This insures that the sentence imposed will reflect society's reasoned moral response to the defendant and the crime, rather than mere sympathy or emotion. The court of appeals failed to apply these principles and, in doing so, dispensed with the requirement that a defendant show that his crime was attributable to the proffered mitigating evidence. Under the holding of the court below, evidence of such factors as child abuse is mitigating *per se* and has relevance beyond the scope of the punishment issues, regardless of the kind or extent of the evidence presented, and the defendant's ability to demonstrate a nexus with his crime.

II.

THE COURT OF APPEALS MISINTERPRETED THIS COURT'S OPINION IN *PENRY v. LYNAUGH* IN DECIDING THAT A CAPITAL MURDER DEFENDANT NEED NOT REQUEST INSTRUCTIONS OR OTHERWISE APPRISE THE TRIAL COURT THAT THE JURY CANNOT CONSIDER THE MITIGATING FORCE OF HIS EVIDENCE IN ORDER TO SUCCESSFULLY ASSERT A CLAIM UNDER *PENRY*.

Although Mayo's evidence of childhood abuse was not proffered for a mitigating value that exceeded the scope of the statutory issues, the court of appeals incorrectly concluded that he could establish an Eighth Amendment violation under *Penry v. Lynaugh* based on the trial court's failure to provide additional instructions *sua sponte*. The court rejected the state's assertion that, apart from any

state procedural requirement,[3] a necessary component for federal review of a claim based on *Penry* is the defendant notifying the trial court in some fashion that his evidence is proffered as mitigating beyond the scope of the special punishment issues. Following *Boyde v. California*, ___ U.S. ___, 110 S.Ct. 1190 (1990), it is clear that, where a trial court was not informed that evidence was proffered for a purpose that exceeded the scope of the statutory punishment issues, it must be assumed, on review, that it was introduced solely for its relevance to those issues.

The conclusion that an Eighth Amendment claim cannot be based on mitigating value that was not urged at trial[4] is borne out by the Court's decision last Term in *Boyde*. Boyde argued that evidence that he won a choreography contest in prison demonstrated he was a model prisoner and, therefore, not a future danger, a factor that could not be addressed under California's capital sentencing procedures. The Court responded that the evidence was offered under California's "catchall" issue of evidence that extenuates the gravity of a defendant's crime, not for the purpose Boyde argued on appeal. Thus,

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[3] The court held that the state was untimely in asserting that Mayo's claim based on *Penry v. Lynaugh* was procedurally barred. In this petition, the state does not contend that the claim is barred from review by Mayo's failure to follow state procedure by objecting to the punishment charge at trial.

[4] Clearly, certain mitigation defenses would be mutually exclusive, and to argue them in the alternative would detract from the impact of each, just as arguing self-defense and alibi at the guilt phase of trial would be ill-advised. For instance, one might argue, as in *Boyde*, that a person from a deprived background had the strength of character to rise from that environment and become a good citizen or, as in *Penry*, that the deprived background contributed to his propensity for violence, thus, lessening his culpability. Because the two theories are in obvious conflict, competent counsel, under any sentencing scheme, necessarily would elect a theory to advance and could rationally elect to proceed exclusively on the former, as Mayo's attorneys did in this case.

the Court analyzed the evidence in light of the purpose for which it was offered and found that, like all evidence of good character, it demonstrated that his crime was an aberration from his otherwise good character. *Boyde v. California*, ___ U.S. at ___ n.5, 110 S.Ct. at 1199 n.5. Here, as in *Boyde*, Mayo should not now be permitted to recharacterize his evidence as having mitigating value that the jury could not consider, when he did not offer the evidence for that purpose at trial and did not alert the trial court that he felt the jury was precluded from considering this new aspect of the evidence.

Only if a defendant requests a special instruction, or otherwise evinces a belief that evidence possesses mitigating value beyond the scope of the special issues and that he wishes the jury to consider that mitigating value, can a trial or reviewing court conclude that a defendant offers evidence for a purpose not encompassed within the special issues.[5] Mayo did not object to the punishment instructions or request a special instruction to enable the jury to give effect to the mitigating value he retrospectively assigns to his evidence. Further, the theory of mitigation that Mayo now asserts, that his childhood abuse reduced his personal culpability for the crime, is inconsistent with defense counsel's closing punishment phase argument.

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[5]This is especially so here, where Mayo was given the opportunity to explain the mitigating relevance of evidence that was not readily apparent to the trial court. When Mayo attempted to introduce some pictures that he had drawn, the court inquired how they were material to the issues in the case. Mayo's attorney responded that they reflected a positive talent that Mayo possessed, at which point they were admitted (R. XX:999). That there was no similar inquiry about the evidence that Mayo had been abused as a child indicates that the court perceived its obvious relevance to the special punishment issues. If Mayo thought that the evidence had any additional mitigating value, it was incumbent upon him to bring it to the court's attention so that, if necessary, steps could be taken to insure that the jury considered it.

The thrust of Mayo's evidence at the punishment hearing was to demonstrate his nonviolent character. The witnesses he called either testified that they had never seen him commit a violent act or rebutted the testimony of state's witnesses who described Mayo's involvement in violent episodes. The theory now advanced by Mayo, attributing the wanton and gratuitous murder to his childhood experience, is inconsistent with the defensive punishment theory actually advanced by Mayo at trial—that he was not a violent person except when provoked.[6]

In discussing whether granting relief to Penry would require announcing a new rule under *Teague v. Lane*, 489 U.S. ___, 109 S.Ct. 1060 (1989), the Court noted that:

> Penry thus seeks a rule that when such mitigating evidence is presented, Texas juries must, *upon request*, be given jury instructions that make it possible for them to give effect to that mitigating evidence in determining whether a defendant should be sentenced to death.

Penry v. Lynaugh, 492 U.S. at ___, 109 S.Ct. at 2945 (emphasis added); *see also id.* at ___, 109 S.Ct. at 2947. This formulation of the holding clearly contemplates that only those defendants who were not satisfied that the jury could consider their evidence, and who voiced their dissatisfaction at trial, would be entitled to the same relief as Penry. *Cf. Batson v. Kentucky*, 476 U.S. 79, 98-101 (1986) (trial court's failure to honor defendant's "timely objection" necessitated remand for hearing on claim of prosecutor's improper use of peremptory challenges). Indeed, the na-

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[6]Although, in closing argument, counsel echoed the sentiment of one witness that Mayo never had a chance, he did so in the context of pointing out that Mayo never had been punished for his prior criminal acts and, thus, had not learned the consequences of violent behavior.

ture of a claim under *Penry* requires that it be raised at the capital sentencing hearing. Particularly where, as in Texas, the jury's role is not to find the existence of, and then weigh, specific mitigating factors but to answer special issues to which a broad spectrum of mitigating evidence is relevant, a trial judge cannot be expected to divine some unurged, unarticulated mitigating aspect of the evidence that exceeds the scope of the special issues. Only if a defendant objects, requests special instructions, or otherwise challenges the adequacy of the statutory special issues to allow jury consideration of his mitigating evidence can the trial court, or any reviewing court, conclude that he offered evidence for a purpose not encompassed by the special issues.

Penry did not announce a new rule. *Penry v. Lynaugh*, 492 U.S. at ___-___, 109 S.Ct. at 2944-47. In fact, the Court noted that *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), dictated the result in Penry. *Id.* at ___, 109 S.Ct. at 2947. *Lockett* and *Eddings* had made it clear that a state may not preclude jury consideration, as mitigating, of evidence of a defendant's character, record, or the circumstances of the offense that was offered in support of a sentence less than death. Thus, by 1982 at the latest, capital murder defendants were on notice that they could attack, on constitutional grounds, a capital sentencing statute that did not allow the jury to consider any evidence that militated in favor of a sentence less than death. Accordingly, it is reasonable to assume that defendants who did not object that their constitutional rights were being violated believed the jury could comprehend and give effect to their mitigating evidence as it was offered. It is equally reasonable to assume that trial judges, hearing no objection, would conclude that defendants offered such evidence solely as reflective of reduced culpability encompassed within the special issues. Absolving the failure to give timely notice to the trial court would unjustly infringe on the state's interests in finality in criminal prosecutions, and would provide an avenue of relief to defendants where they perceived no error at trial.

The court of appeals' rejection of this argument is contrary to, and cannot be reconciled with, the holdings in *Penry* and *Boyde*. Unless corrected, the error will permit capital murder defendants who felt at the time of their trials that the mitigating value of their evidence could be considered by the jury in answering the punishment issues to now challenge their valid sentences of death by manufacturing new aspects of the evidence that arguably were beyond the scope of the issues. This Court should grant the petition for certiorari to foreclose this unwarranted assault on the finality of state court convictions.[7]

III.

THE COURT OF APPEALS IGNORED THIS COURT'S DECISIONS THAT THE MITIGATING VALUE OF A CAPITAL MURDER DEFENDANT'S EVIDENCE OF CHILD ABUSE AND SIMILAR EVIDENCE DEPENDS ON THE EXTENT TO WHICH THE DEFENDANT SHOWS THAT HIS CRIME IS ATTRIBUTABLE TO THAT BACKGROUND.

The evidence of Mayo's childhood abuse was not probative of a reduced personal culpability for the crime and had no constitutionally mitigating value beyond the scope of the statutory punishment issues. Aspects of a defendant's character or background are not *per se* constitutionally mitigating. Rather, character or background evidence, introduced for its relevance to the defendant's personal culpability, is constitutionally mitigating only if the proffered aspects of the defendant's character or back-

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[7] This question currently is pending before the *en banc* Court of Appeals for the Fifth Circuit in *Graham v. Collins*, 896 F.2d 893 (5th Cir.), *reh'g en banc granted*, 903 F.2d 1014 (5th Cir. 1990). The Court should at least hold this case until *Graham* is decided to insure that the issue is treated consistently.

ground are viewed by society as reducing a defendant's culpability for the crime[8] and only if the crime is in fact attributable to them. Even assuming, *arguendo*, that childhood abuse under some circumstances may be so persistent and severe that society would assume attribution, that is not the case presented by Mayo's evidence. The requirement imposed by the court below that the jury be authorized to accord mitigating value to childhood abuse, where there is no evidence that the crime is in any manner attributable to that abuse, impermissibly mandates sentencing based not on the defendant's culpability but on the jury's emotional response to the evidence. The resulting sentence would not be the reasoned moral response required by the Eighth Amendment. It follows that Mayo's Eighth Amendment rights were not violated by the failure to provide jury instructions authorizing a sentence less than death based on his evidence of childhood abuse.

It is well settled that a capital defendant's Eighth Amendment right to a reliable sentencing determination requires individualized sentencing. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). Individualized sentencing, in the context of capital punishment, not only ensures that the punishment imposed will serve society's traditional, and thus constitutionally recognized, interests of retribution, deterrence, and rehabilitation, *Gregg v. Georgia*, 428 U.S. 153, 183-86 (1976), it furthers the Eighth Amendment's requirement of reliable sentencing by focusing the sentencer's attention on the defendant's personal culpability for the murder and his capacity for rehabilitation. *See Penry v. Lynaugh*, 492 U.S. at ___, 109 S.Ct. at 2947 (underlying *Lockett* and *Eddings* is the principle that punishment should be directly related to personal culpability of defendant); *Franklin v. Lynaugh*, 487 U.S. 164, 184 (1988), (O'Connor, J., concurring) (same); *California v.*

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[8] As a practical matter, society only views those aspects of a defendant's character or backgound that are beyond his control as potentially reducing his culpability for his conduct.

Brown, 479 U.S. 538, 545 (1987) (same); *Skipper v. South Carolina*, 476 U.S. 1 (1986) (past conduct as indicative of probable future conduct is inevitable element of criminal sentencing, and evidence that defendant would not pose a future danger if spared a death sentence must be considered potentially mitigating); *see also California v. Ramos*, 463 U.S. 992, 1002-03 (1983).

The requirement that the jury be able to consider a defendant's personal culpability reflects society's interest in the retribution aspect of individualized sentencing. *See Enmund v. Florida*, 458 U.S. 782, 798 (1982); *Tison v. Arizona*, 481 U.S. 137, 149 (1987) (heart of the retribution rationale is that sentence must be directly related to the personal culpability of the criminal offender). Procedurally, this is achieved by requiring that the sentencing authority be allowed to consider, as mitigating, whatever evidence of his character, record, or the circumstances of the offense that a defendant offers in support of a sentence less than death. *Penry v. Lynaugh*, 492 U.S. at ___, 109 S.Ct. at 2947; *Franklin v. Lynaugh*, 487 U.S. at 184 (O'Connor, J., concurring); *California v. Brown*, 479 U.S. at 545 (O'Connor, J., concurring); *Lockett v. Ohio*, 438 U.S. at 607.

In order for character or background evidence such as that urged by Mayo and the court of appeals below to be constitutionally mitigating[9] in the sense that it reflects a reduced culpability for the offense, the evidence must both

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[9] As the Court has recognized, evidence of a defendant's character or background either may illustrate positive character traits or explain the crime. Thus, the evidence that the defendant had won a dance contest in prison in *Boyde* demonstrated that the capital murder was an abberation from an otherwise good character. Similarly, the evidence of mental retardation in *Penry* was such that it provided an explanation for his conduct. It cannot reasonably be argued, nor did the court of appeals contend, that the evidence of Mayo's positive character traits, as in *Boyde*, could not be considered under the punishment issues.

encompass an aspect or aspects of the defendant's character or background that society believes to be mitigating and establish that the crime is attributable to the circumstances offered in mitigation.

> [E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are *attributable* to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. . . .

Franklin v. Lynaugh, 487 U.S. at 184 (O'Connor, J., concurring), *citing California v. Brown*, 479 U.S. at 545 (1987) (O'Connor, J., concurring) (emphasis added); *see also Penry v. Lynaugh*, 492 U.S. at ___, 109 S.Ct. at 2947. Absent a nexus between the mitigating aspects of the defendant's character, record, or the circumstances of his crime and the crime itself, the evidence cannot demonstrate that the defendant is less morally culpable than any other citizen.

Requiring consideration of mitigating evidence to be limited and guided by its relevance to the defendant's personal culpability and potential for rehabilitation renders the jury's verdict "a reasoned moral response to the defendant's background, character, and crime rather than mere sympathy or emotion." *California v. Brown*, 479 U.S. at 545 (O'Connor, J., concurring). "It is no doubt constitutionally permissible, *if not constitutionally required*, for the State to insist that 'the individualized assessment of the appropriateness of the death penalty be a moral inquiry into the culpability of the defendant and not an emotional response to the mitigating evidence.'" *Saffle v. Parks*, ___ U.S. ___, ___, 110 S.Ct. 1257, 1262 (1990) (emphasis added), *quoting California v. Brown*, 479 U.S. at 545. Where the sentencing decision can be based on evidence that is irrelevant to a defendant's personal culpa-

bility for the crime or his capacity for rehabilitation, there is a substantial risk that the sentence may reflect the jurors' emotional sensitivities or sympathy rather than a reasoned moral response. Such a sentencing proceeding runs afoul of the "long-standing recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary." *Saffle v. Parks*, ___ U.S. at ___, 110 S.Ct. at 1262, *citing Gregg v. Georgia*, 428 U.S. at 189-95; *see also Gardner v. Florida*, 430 U.S. 349, 358 (1977) ("it is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion").

The court below referred to the "traumatic circumstances of Randy's upbringing," and granted relief because Mayo's evidence of childhood abuse was the same type of evidence as that introduced in *Penry*. *Mayo v. Lynaugh*, 893 F.2d at 688. In doing so, the court of appeals ignored the significant differences between Penry's evidence of child abuse and that introduced by Mayo. More importantly, the court relieved Mayo of the necessity of demonstrating that his punishment phase evidence supplied the required nexus between any evidence of childhood abuse and the capital murder for which he was being sentenced.

Mayo's evidence of child abuse differed both in kind and in extent from that introduced by Penry. The entirety of the evidence he introduced consisted of the testimony of his mother and his father's former employer. Mayo's mother testified that there had been "continuous violence" in the family but indicated that much of it that was directed at Mayo was verbal in nature.

> Q: (by defense counsel): What kind of verbal abuse are you talking about?
>
> A: Well, he would cuss him, and he would tell him that he was a hoodlum or he was a thug, he

> never would be any good, and just run him down, just, you know. . . .

(R. XX:993-94). She referred to a couple of times when Mayo suffered unexplained broken bones but added that she had not been home when the incidents occurred and could not say how he had been injured (R. XX:994).

Raymond Allison, who had employed Mayo's father for a time, testified that Mayo came from a "pretty rough environment" (R. XX:1006), which he described as

> Well, they'd come out there to the station, and they would just get in a fuss; in other words, almost a cuss fight, right at the point of fighting, and cussing.

(R. XX:1007)[10] He testified that at home "they did the same thing, fuss and fighting and all and — as they did out at the station because I was over there, and they'd start a fussing fight two or three times, and I would leave and go back to work" (*Id.*). In addition, Allison testified about "a time or two" that Mayo's father beat him, stating that there was "one good time that I know of, beat him real hard" (*Id.*). Finally, Allison mentioned that Mayo's younger brother had appeared at school one day with "stripes" from having been beaten, and that authorities had removed all of the children from the home for a time (R. XX:1009-10). Allison had not seen the marks, knew nothing about the circumstances, and did not state that Mayo also had been beaten (R. XX:1010).

Mayo's only attempt to connect his crime with any of these incidents came when Allison opined that people are

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[10] Allison's concern in these instances was that the scene looked bad for the customers of his service station. Nothing in his testimony indicates that he felt anyone was in any physical danger at these times (R. XX:1007).

products of their environment and that, if Mayo had "had a chance," he might not have been on trial (R. XX:1008). He acknowledged, however, that he had no psychiatric training or experience that would qualify him to give medical or scientific opinions (R. XX:1014).

The entire thrust of Mayo's evidence at the punishment hearing was to demonstrate his nonviolent character. The witnesses he called either testified that they never had seen him commit a violent act or rebutted the testimony of state's witnesses who described violent episodes involving Mayo (*e.g.*, R. XX: 955-57; 963; 966-70; 976-78; 983-84; 986).

In closing argument, counsel echoed Allison's sentiment that Mayo had never had a chance, but he did so in the context of pointing out that Mayo never had been punished for his prior criminal acts and, thus, had not learned the consequences of violent behavior (R. XXI:1053-54). An argument by counsel that, although Mayo had not been a violent person in the past except when provoked, his wanton and gratuitous murder was attributable to his childhood experiences properly would have been viewed with skepticism by the jury.[11]

In contrast, Penry offered striking evidence of severe and continuous abuse. For example, Penry had been subjected to repeated beatings on the head by a belt buckle. A psychiatrist testified that the beatings were so severe that they could have been the cause of his brain damage. Other witnesses testified that Penry had exhibited behavioral problems from the time he was a child. *Penry v.*

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[11] Thus, even if it is assumed, *arguendo*, that Mayo's evidence of childhood abuse, without more, was probative of a reduced culpability for the crime, what he now asserts is that the trial court should have *sua sponte* provided an instruction to facilitate a theory of mitigation that was in conflict with the theory actually urged by counsel in closing argument.

Lynaugh, 832 F.2d 915, 917 (5th Cir. 1987). Further, he was frequently locked in a room for long periods of time with neither food nor water, and without access to toilet facilities. Both the psychiatrists who testified for the state and for Penry agreed that Penry's abuse contributed at least to some extent to his commission of the capital murder. *Penry v. Lynaugh*, 492 U.S. at ___, 109 S.Ct. at 2941-42. Thus, not only did Penry present far more extensive evidence of parental abuse than did Mayo, he presented reliable evidence that, if credited, demonstrated how that abuse rendered him less culpable for his crime.

It is precisely because the nature and severity of such experiences as child abuse can vary widely that a defendant claiming that the abuse he suffered makes him less deserving of a sentence of death must demonstrate that his crime is attributable to that abuse. To equate Mayo's evidence with Penry's would be appropriate only if society believes that *all* child abuse victims, no matter what the type or extent of the abuse, are affected by their experiences in a manner that automatically renders them less culpable for later actions. Mayo's failure to present evidence showing a nexus between his crime and the abuse he received obviated any need for a jury instruction on consideration of his evidence, assuming the trial court was required to give such an instruction *sua sponte*. Moreover, had such an instruction been given, in the absence of a demonstrated attribution of his crime to the fact of his child abuse, there would have been a substantial risk that the jury's verdict would have been nothing more than a reflection of the jurors' emotional sensitivities or sympathy rather than a reasoned moral response to the evidence. The court of appeals' decision injects caprice and emotion into the capital sentencing process, and the petition should be granted to correct the lower court's error.

CONCLUSION

For the foregoing reasons, Petitioner prays that the petition for certiorari to the Court of Appeals for the Fifth Circuit issue.

Respectfully submitted,

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APPENDIX

APPENDIX A

Randy Dale MAYO,
Petitioner-Appellant,
v.
James A. COLLINS, Director, Texas Department of Criminal Justice, Institutional Division,
Respondent-Appellee.

No. 89-1127.

United States Court of Appeals, Fifth Circuit.

Dec. 17, 1990.

Appeal from the United States District Court for the Northern District of Texas;
David O. Belew, Jr., Judge.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion January 23, 1990, 5th Cir., 893 F.2d 683)

Before RUBIN, KING, and HIGGINBOTHAM, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

The court's opinion on petition for rehearing is modified in the following regards:

The sentence in the opinion at 893 F.2d 688 reading as follows is deleted: Similarly, pictures introduced to demonstrate Mayo's artistic sensibilities were described by the prosecution as evidencing a fascination with young girls "not unlike" the victim of Mayo's crime.

The following sentence is inserted at the end of the last paragraph on page 688, immediately following footnote 34: As in *Penry*, the special issues submitted to the jury "did not provide a vehicle for the jury to give mitigating effect to [Mayo's] evidence of . . . child abuse." [35]

Subject to these changes, the petition for rehearing is DENIED and no member of this panel or Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

APPENDIX B

Randy Dale MAYO,
Petitioner-Appellant,

v.
James A. LYNAUGH, Director,
Texas Department of Corrections,
Respondent-Appellee.

No. 89-1127.

United States Court of Appeals, Fifth Circuit.

Jan. 23, 1990.

Appeal from the United States District Court for the Northern District of Texas.

Before RUBIN, KING, and HIGGINBOTHAM, Circuit Judges.

ON PETITION FOR REHEARING

(Opinion June 30, 1989, 5th Cir.1989, 882 F.2d 134)

(Opinion Sept. 1, 1989, 5th Cir.1989, 883 F.2d 358)

ALVIN B. RUBIN, Circuit Judge:

Randy Dale Mayo, a Texas state prisoner sentenced to death by lethal injection, requests rehearing by this panel of his claim that the jury was unconstitutionally prevented from considering all of the mitigating evidence he presented at the sentencing phase of his trial, in violation of *Franklin v. Lynaugh*[1]

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[1] 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988).

and *Penry v. Lynaugh*.[2] Mayo argues that, contrary to this panel's conclusion in initially denying rehearing, he did not procedurally default his *Penry* claim because the state itself had waived the procedural default argument. For the reasons stated below, we agree with Mayo's argument, and reverse and remand for further proceedings in accordance with this opinion.

I.

The facts regarding earlier proceedings in this case are set forth in our previous opinions, and we will only summarize them. In January 1985, Mayo was convicted by a Texas jury of capital murder while in the course of committing an aggravated sexual assault. After a separate sentencing hearing, the jury returned affirmative answers to the two special issues submitted pursuant to the Texas capital sentencing statute,[3] and the court sentenced Mayo to death by lethal injection.

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[2] ___U.S.___, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

[3] Tex.Crim.Proc.Code Ann. art. 37.071(b) (Supp.1990) states that:

> On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:
>
> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

The parties agreed that the special issue three was not raised by the evidence, and so that question was not submitted to the jury.

His conviction and sentence were affirmed on direct appeal to the Texas Court of Criminal Appeals,[4] and the trial court denied his subsequent motions for collateral review.

Two days before the date the trial court had set for his execution, Mayo filed a motion for a stay of execution and for a writ of habeas corpus in the United States District Court for the Northern District of Texas, San Angelo Division, and that court stayed the execution. After two evidentiary hearings before a United States Magistrate, both conducted after new counsel had been appointed at Mayo's request, the magistrate recommended that the writ be denied. However, after the state had expressly waived its right to seek exhaustion in state court, the district court allowed Mayo leave to file a second amended petition asserting a claim based on *Franklin v. Lynaugh*,[5] this circuit's decision in *Penry v. Lynaugh*,[6] and the Supreme Court's grant of certiorari in *Penry v. Lynaugh*.[7] Mayo argued both that the Texas capital sentencing statute was facially unconstitutional and that it was unconstitutional as applied to his case, likening his presentation of mitigating evidence at the sentencing phase of trial to the circumstances of *Penry* and distinguishing the circumstances of *Franklin*. After conducting a hearing to determine whether Mayo

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[4] *Mayo v. State*, 708 S.W.2d 854 (Tex.Crim.App.1986) (en banc).

[5] 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988).

[6] 832 F.2d 915 (5th Cir.1987), *aff'd in part and rev'd in part*, ___U.S.___, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

[7] ___U.S.___, 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988) (granting certiorari in part).

had additional evidence regarding mitigating circumstances, the district court rejected his challenge, adopted the findings and conclusions of the magistrate, denied the writ of habeas corpus, and vacated the stay of execution.

On appeal, this court reviewed the district court's disposition of Mayo's *Franklin-Penry* claim, noting Mayo's contentions that "the jury was precluded from giving effect to all the mitigating evidence submitted during the sentencing phase of his trial" and "that the Texas capital punishment scheme is unconstitutional because the jury is prevented from considering mitigating evidence except on the issues of the deliberateness of the murder and the probability of future dangerousness."[8] In an opinion released four days after the Supreme Court's decision in *Penry*, we stated "[w]e are bound by the precedents of this circuit that have upheld the constitutionality of the Texas statute, and therefore we must deny relief on this claim. That the Supreme Court has granted certiorari in a particular case does not allow us to grant relief to other petitioners who raise a similar claim."[9]

Both parties petitioned for rehearing on the basis of the Supreme Court's decision in *Penry*. Although we modified our opinion accordingly, we denied the petition for rehearing on two bases. We first observed that Mayo's failure to raise his claim at trial constituted a procedural default under Texas law, requiring him to demonstrate cause-and-prejudice to redeem the claim; we further noted that circuit precedent on the issue of cause-and-prejudice for

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[8] 882 F.2d 134, 140 (5th Cir.1989).

[9] *Id.* at 140-41 (footnotes omitted).

failure to raise a *Penry* claim at trial had not been consistent.[10] "Assuming, however, without deciding that the merits of the claim [we]re before us," we also denied relief on the basis that Mayo had not sufficiently articulated "how the jury was unable to express its reasoned moral response and give effect to his mitigating evidence."[11]

Mayo's second petition for a rehearing argues for the first time that his *Franklin-Penry* claim is not procedurally barred because the state waived the defense, and argues anew that his claim is entitled to relief on the merits under *Franklin* and *Penry*. The state opposes this petition. While recognizing the interest in tempering collateral challenges to capital sentences,[12] we grant rehearing to correct our previous opinions.[13]

II.

Mayo argues that the state waived the issue of procedural default in two ways: first, by explicitly

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[10] 883 F.2d 358, 359 (5th Cir.1989), *citing King v. Lynaugh*, 868 F.2d 1400, 1406 (5th Cir.) (Rubin, J., concurring), 1408 (Johnson, J., concurring), *cert. denied*, ___U.S.___, 109 S.Ct. 1576, 103 L.Ed.2d 942 (1989).

[11] 883 F.2d at 359-60.

[12] *See Penry*, 109 S.Ct. at 2944.

[13] *See* Fed.R.App.Proc. 40(a); *see, e.g., Bridge v. Lynaugh*, 863 F.2d 370 (5th Cir.1989) (granting second rehearing to find absence of legal cause for petitioner's procedural default); *Sun Oil Co. v. Burford*, 130 F.2d 10, 13 (5th Cir.1942) (court may grant second petition for rehearing to prevent injustice), *rev'd on other grounds*, 319 U.S. 315, 63 S.Ct.1098, 87 L.Ed. 1424 (1943).

waiving exhaustion of Mayo's *Franklin-Penry* claim during argument before the district court, the state also implicitly waived the issue of procedural default; second, by waiting until its own petition for rehearing to argue that Mayo had procedurally defaulted his claim, the state effectively waived the issue.

Mayo's first argument asserts that whatever the correct view of the law, the state perceived that by waiving exhaustion it was also waiving the issue of procedural default, and that the state's intent should govern our construction of the waiver. The two issues, however, are different;[14] indeed, the argument that Mayo's claim has been procedurally defaulted would maintain that he had failed to comply with the Texas procedural rule requiring objection at trial,[15] and that therefore all state (and federal) review of his claim was foreclosed, not ripe for exhaustion.[16] The state did not implicitly waive procedural default by exercising its conditional authority to waive exhaustion.[17]

This circuit, however, has consistently held that a state waives a procedural bar argument by failing to

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[14] *See* 1 J. Liebman, Federal Habeas Corpus Practice and Procedure § 5.3(b) at 45-46 n. 7 (1988).

[15] *See Mayo v. Lynaugh*, 883 F.2d at 359, *citing Selvage v. Lynaugh*, 842 F.2d 89, 93 (5th Cir.1988).

[16] *See, e.g., Engle v. Isaac*, 456 U.S. 107, 125-26 n. 28. 102 S.Ct. 1558, 1570-71 n. 28, 71 L.Ed.2d 783 (1982).

[17] *Cf. Granberry v. Greer*, 481 U.S. 129, 107 S.Ct. 1671, 95 L.Ed.2d 119 (1987).

present the issue in district court.[18] In this case, the state did not raise its procedural default argument until it filed a petition for rehearing of our decision on appeal. The state argues that it has made no waiver because its defense was fatally impaired by Mayo's failure to raise the *Penry* claim in state court. Such an exception, of course, would protect all waivers of procedural default defenses, and would allow the state to raise the defense at any juncture it chose. The state, however, does not request such a broad rule. Instead, it argues that it is excused because *Teague v. Lane*[19] held for the first time that federal habeas review is precluded for a claim that was not raised in state court if it is clear that the state court would have imposed a procedural bar and refused to consider that merits of the claim.

The Court in *Teague* merely observed that its imposition of the procedural default rule was consistent with the requirement of *Harris v. Reed*[20] that the last state court rendering a judgment must have "clearly and expressly" rested its judgment on a state

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[18] *See, e.g., Reddix v. Thigpen*, 805 F.2d 506, 512 (5th Cir.1986); *Wiggins v. Procunier*, 753 F.2d 1318, 1321 (5th Cir.1985); *Washington v. Watkins*, 655 F.2d 1346, 1368 (5th Cir.1981), *cert. denied*, 456 U.S. 949 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982); *Smith v. Estelle*, 602 F.2d 694, 708 n. 19 (5th Cir.1979), *aff'd*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981); *LaRoche v. Wainwright*, 599 F.2d 722, 724 (5th Cir.1979); *see also Granberry*, 481 U.S. at 131, 131 n. 3, 107 S.Ct. at 1673 n. 3; *Engle v. Isaac*, 456 U.S. at 125 n. 26, 102 S.Ct. at 1570 n. 26; *Estelle v. Smith* 451 U.S. 454, 468 n. 12, 101 S.Ct. 1866, 1875 n. 12, 68 L.Ed.2d 359 (1981); *Jenkins v. Anderson*, 447 U.S. 231, 234 n. 1, 100 S.Ct. 2124, 2127 n. 1, 65 L.Ed.2d 86 (1980).

[19] ___U.S.___, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

[20] ___U.S.___, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989).

procedural bar before a federal court may bar consideration on that ground, since the *Harris* rule assumed that a state court has had the opportunity to address the claim.[21] Such a distinction has little purchase in the present situation: the issue here is not the opportunity afforded state courts, but the opportunity afforded the respondent to raise the issue, and it cannot be disputed that the state could have responded to Mayo's *Franklin-Penry* claim by raising the issue of procedural default before the federal district court. Moreover, the distinction observed in *Teague* was scarcely so new as to excuse the state's delay. The need to distinguish *Harris v. Reed* first arose on the day that *Harris* and *Teague* were both announced, and *Teague* cited *Engle v. Isaac*[22] for the proposition that a procedural default rule may be applied to a claim that has never been raised in state court.[23] Finally, although the *Teague* decision was rendered before Mayo filed his opening appellate brief, the state's first suggestion of procedural default came in its petition for rehearing after this court had rendered its first opinion.

The state also cites our decision in *Wiggins v. Procunier*[24] in support of the argument that if a procedural bar can be "raised at any point in the district court proceedings,"[25] it can be raised at any

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[21] *Teague*, 109 S.Ct. at 1068-69, *citing Harris*, 109 S.Ct. at 1042-45, 108 S.Ct. at 1046-48 (O'Connor, J., concurring).

[22] 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982).

[23] 109 S.Ct. at 1068, *citing Engle*, 456 U.S. at 113-14, 117, 124-35, 102 S.Ct. at 1570-76.

[24] 753 F.2d 1318 (5th Cir.1985).

[25] *Id.* at 1321.

point in the appellate proceedings, including a petition for rehearing. But although it may be permissible to allow a district court any opportunity to evaluate the alleged procedural default,[26] the same flexibility cannot be posited to allow raising a procedural default defense at any juncture in proceedings.[27]

Although Mayo in turn has raised the issue of the state's waiver of the procedural default issue at a later juncture than was necessary, the state's briefs do not suggest that he has therefore waived his waiver argument. The blame for the lack of consideration of the procedural default issue in the district court and on the initial appeal must rest with the state in any event, and no significant burden is imposed by the delay from the first, mutually requested consideration of rehearing until this point in the proceedings.[28]

III.

Penry reviewed a sentencing proceeding in which the trial counsel for Penry had presented evidence at a pre-trial competency hearing before a jury and at the guilt-innocence phase of the trial suggesting that Penry suffered from organic brain damage and moderate retardation, was frequently beaten by his mother as a youth, and had a variety of learning and behavioral

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[26] *But see Smith v. Estelle*, 602 F.2d at 708 n. 19.

[27] *See supra* note 18 and accompanying text.

[28] *Compare Engle*, 456 U.S. at 125 n. 26, 102 S.Ct. at 15 n. 26 ("waiver of waiver" argument defaulted when both district court and court of appeals evaluated procedural default issue and petitioner failed to present the argument until his brief on the merits before the Supreme Court).

dysfunctions.[29] Penry's counsel also objected to the proposed jury charge at the sentencing phase, arguing in relevant part that the charge failed to "authorize a discretionary grant of mercy based upon the existence of mitigating circumstances," "fail[ed] to require as a condition to the assessment of the death penalty that the State show beyond a reasonable doubt that any aggravating circumstances found to exist outweigh any mitigating circumstances," failed to instruct the jury that it might take into account all of the aggravating and mitigating evidence submitted during the full trial of the case, and permitted the death penalty in circumstances amounting to cruel and unusual punishment.[30]

The Supreme Court held that the three special issues submitted to the jury at the sentencing phase pursuant to the Texas capital sentencing statute did not allow the jury to fully consider and give effect to the mitigating evidence of Penry's mental retardation and abused background. Although consideration of Penry's "deliberateness" in committing the crime, the probability that he would commit future violent criminal acts, and the possibility that he acted in self-defense would allow the jury to consider some aspects of the evidence concerning mitigating circumstances, and despite the fact that defense counsel was free to argue those circumstances to the jury, the Supreme Court concluded that the prosecutor's argument that the jurors must follow the instructions they were given regarding the special issues and the absence of appropriate jury instructions concerning mitigation

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[29] 109 S.Ct. at 2941-42; *Penry v. Lynaugh*, 832 F.2d 915, 917 (5th Cir.1987).

[30] *See* 109 S.Ct. at 2942-43.

would have allowed a reasonable juror to believe "that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence."[31]

Mayo's counsel presented eight witnesses at the sentencing phase. Patsy Mayo, petitioner's mother, and Raymond Allison, a friend of the family who had employed Randy and R.T. "Buddy" Mayo, Randy's father, each testified to the traumatic circumstances of Randy's upbringing. Patsy Mayo testified that her husband began beating Randy when Randy was four or five years old, that Randy had suffered several unexplained broken bones, that Buddy had made numerous death threats to her and the children, that Buddy's physical and verbal abuse of Randy was continuous, and that at the time of the sentencing phase Buddy was in prison for having raped a child. Allison also testified that Buddy Mayo had verbally and physically abused Randy, that all the Mayo children had been removed from their home for several months after Randy's brother reported to school with signs of physical abuse, and that Randy's subsequent criminal acts were probably the result of his home environment. Allison and other witnesses testified to various good works performed by Mayo, his religious faith, and his artistic ability and interest.

As in *Penry*, the mitigating evidence presented was not accompanied by jury instructions that would have allowed a juror to give effect to her conclusion that Mayo was less morally culpable or otherwise undeserving of death because of his family background or personal circumstances.[32] Instead, also as in *Penry*,

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[31] 109 S.Ct. at 2950.

[32] *Id.* at 2949.

Mayo's "history of abuse [was] a two-edged sword":[33] the prosecution converted Mayo's "deep-rooted, deep-seated problems" into evidence of future dangerousness, problems that "would stay there for a long time unless we do something about" them. Similarly, pictures introduced to demonstrate Mayo's artistic sensibilities were described by the prosecution as evidencing a fascination with young girls "not unlike" the victim of Mayo's crime. The prosecutor's closing successfully focused the jury's attention on the exclusive relationship between the evidence presented at the guilt-innocence and sentencing phases and the special issues, but the special issues did not afford sufficient opportunity for consideration of the mitigating evidence Mayo offered.[34]

Mayo's circumstances differ from Penry's in two potentially significant but ultimately inconclusive ways. First, Mayo's counsel did not present any evidence that Mayo was mentally retarded. *Penry*, of course, did not require evidence of any particular mitigating circumstance. It held that "the jury must be able to consider and give effect to *any* mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime."[35] Indeed, the Supreme Court specifically rejected the argument that Penry's mental retardation amounted by itself to a Eighth Amendment impediment to execution.[36] The

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[33] *Id.*

[34] *Compare Russell v. Lynaugh*, No. 88-6010, ___F.2d___ (5th Cir. Dec. 8, 1989) (mitigating evidence specifically proffered in context of special issues); *McCoy v. Lynaugh*, 874 F.2d 954, 966 (5th Cir.1989) (same).

[35] *Id.* at 2951 (emphasis added).

[36] *Id.* at 2954-58.

appropriate question under *Penry* is simply whether Mayo has presented sufficient "constitutionally mitigating evidence" to warrant additional jury instruction,[37] and we determine that he has.

Unlike *Penry*, Mayo's defense counsel expressly waived any objections to the jury charge. The state strenuously argues that timely objection to the proposed jury charge or a request for additional instructions is a predicate for raising a claim under *Penry*. *Penry* itself gives little support to this construction. The Court considered itself to be addressing the question of whether Penry "was sentenced to death in violation of the Eighth Amendment because the jury was not adequately instructed to take into consideration all of his mitigating evidence and because the terms in the Texas special issues were not defined in such a way that the jury could consider and give effect to his mitigating evidence in answering them."[38] Although the Court's description of the rule sought by Penry involved the request for jury instructions,[39] discussion of the important limitations to the holding left unmentioned the

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[37] *Compare DeLuna v. Lynaugh*, No. 89-6262, slip op.___, ___F.2d___ (5th Cir. Jan 12, 1990) (deliberate failure of trial counsel to introduce mitigating evidence, combined with absence of compelling "kind and quantum" of mitigating evidence offered on collateral review, do not warrant relief under *Penry*); *McCoy v. Lynaugh*, 874 F.2d at 966 (no mitigating evidence offered during sentencing phase of trial); *King v. Lynaugh*, 868 F.2d 1400, 1405 (5th Cir.1989) (per curiam) (evidence on drug dependency presented on collateral review that was found not credible by state habeas court, coupled with allegation of disadvantaged youth, do not present sufficient case for diminished culpability to support procedurally defaulted *Penry* claim).

[38] *Id.* at 2943-44.

[39] *Id.* at 2947.

role of objections or requests for instructions, and several statements of the holding likewise omitted any such qualification.[40]

The state suggests that the same reasons that have persuaded this court of the need for contemporaneous objection to preserve a claim under *Batson v. Kentucky*[41] recommend requiring timely objection as an integral part of a *Penry* claim. On rehearing in *Jones v. Butler*,[42] we concluded that "[t]he nature of the [*Batson*] claim requires that it be raised when the strikes are made," because the defendant must first make a prima facie showing, the state must come forward with a neutral explanation for challenging black jurors, and the trial judge must then evaluate the state's explanation. The inquiry is essentially one of fact, dependent on credibility, and the passage of time would diminish the prosecutor's reconstruction of his reasons for striking a venireperson and the judge's evaluation of the juror.[43] While we also suggested that contemporary objection better allowed remedy before trial by seating the wrongfully struck venireperson,[44] our decision necessarily rested primarily on the nature of the claim.

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[40] *Id.* at 2951.

[41] 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

[42] 864 F.2d 348, 368-71 (5th Cir.1988), *cert. denied*, ___U.S.___, 109 S.Ct. 2090, 104 L.Ed.2d 653 (1989).

[43] *Id.* at 369-70.

[44] *Id.* at 370.

Unlike a *Batson* claim, a *Penry* claim does not require a contemporary explanation by the prosecution or a fact-laden evaluation of pre-trial conduct, but instead focuses on the mitigating evidence presented, the conduct of the sentencing phase, and the instructions provided the jury pursuant to the Texas capital sentencing statute.[45] Contemporaneous objection would not initiate a finely-tuned procedure that might repair an otherwise defective trial, but rather would confront the limited, mandatory terms of the Texas statute in an attempt to repair the sentencing phase of trial alone. Mayo's counsel satisfied the prerequisites of the claim by offering mitigating evidence at the sentencing phase. Although it may frequently be the case that timely enforcement of state procedural bars will effectively require contemporaneous objection in order to preserve a *Penry* claim for review by state and federal courts,[46] the nature of the claim itself does not duplicate that predicate in the absence of a tenable procedural default argument.

IV.

For the foregoing reasons, we GRANT the motion for rehearing, REVERSE the district court's denial of a writ of habeas corpus, REMAND for further proceedings consistent with this opinion, and revise those portions of our previous opinions[47] that would be inconsistent with this opinion.

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[45] 109 S.Ct. at 2948-51.

[46] *See, e.g., Fierro v. Lynaugh*, 879 F.2d 1276, 1281-82 (5th Cir.1989); *King v. Lynaugh*, 868 F.2d at 1405; *but see id.* at 1407 (Rubin, J., concurring), *citing Williams v. Lynaugh*, 837 F.2d 1294, 1296 (5th Cir.1988).

[47] 883 F.2d 358 (5th Cir.1989); 882 F.2d 134 (5th Cir.1989).

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-1127

D.C. Docket No. CA6-86-0080

RANDY DALE MAYO,

Petitioner-Appellant,

versus

JAMES A. LYNAUGH, Director
Texas Department of Corrections,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Texas

Before RUBIN, KING and HIGGINBOTHAM, Circuit Judges.

JUDGMENT ON REHEARING

This cause came on to be heard on petitioner-appellant's petition for rehearing;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petition for rehearing is granted; the judgment of the District Court appealed from is reversed and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

January 23, 1990

ISSUED AS MANDATE:

APPENDIX C

Randy Dale MAYO,
Petitioner-Appllant,
v.
James A. LYNAUGH, Director,
Texas Department of Corrections,
Respondent-Appellee.

No. 89-1127.

United States Court of Appeals, Fifth Circuit.

Sept. 1, 1989.

Appeal from the United States District Court for the Northern District of Texas.

(Opinion June 30, 1989, 5th Cir.1989, ___ F.2d ___)

ON PETITION FOR REHEARING

Before RUBIN, KING, and HIGGINBOTHAM, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

Both parties urge rehearing based on the Supreme Court's decision in *Penry v. Lynaugh*,[1] issued four days before the opinion was released in this case. *Penry* held that the evidence presented concerning Penry's mental retardation and abused childhood could not have been adequately considered as mitigating evidence, absent proper jury instruction, under the

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[1] ___U.S.___, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

Texas capital sentencing schemes. We addressed Mayo's *Penry* claim in Part VI of our opinion:

> Mayo contends that the Texas capital punishment scheme is unconstitutional because the jury is prevented from considering mitigating evidence except on the issues of the deliberateness of the murder and the probability of future dangerousness. We are bound by the precedents of this circuit that have upheld the constitutionality of the Texas Statute, and therefore we must deny relief on this claim. That the Supreme Court has granted certiorari in a particular case does not allow us to grant relief to other petitioners who raise a similar claim.[2]

Because the Supreme Court's decision in *Penry* brings into question the validity of some of the precedents on which we relied,[3] we modify as follows our holding denying relief on Mayo's claim that the jury was unconstitutionally prevented from considering all of his mitigating evidence. However, because the record does not sufficiently support a *Penry* claim, the petition for rehearing is denied.

Mayo's failure to raise his *Penry* claim at trial constitutes a procedural default under Texas law[4] that

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[2] *Mayo v. Lynaugh*, No. 89-1127, slip op. at 4587, ___F.2d___, ___ (5th Cir. June 30, 1989) (footnotes omitted).

[3] *See id.* at n. 29 (citing *Graham v. Lynaugh*, 854 F.2d 715 (5th Cir.1988), *vacated remanded for further consideration in light of Penry*, ___U.S.___, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

[4] *See Selvage v. Lynaugh*, 842 F.2d 89, 93 (5th Cir.1988).

precludes him from raising it in this post-conviction proceeding, absent a showing of cause for the noncompliance and actual prejudice resulting from the alleged constitutional violation.[5] The decisions of this circuit on the issue whether a petitioner has shown cause-and-prejudice for failure to raise a *Penry* claim at trial have not been consistent.[6] Assuming, however, without deciding that the merits of the claim are before us, we are unable to grant relief.

At the sentencing phase of his trial, Mayo called eight witnesses who testified that he was not violent and did good deeds or who rebutted testimony of state witnesses concerning specific acts of violence by Mayo. Two witnesses also testified generally that Mayo's father was abusive: his mother stated that Mayo's father beat him, verbally abused him, and threatened the children with weapons; a former employer stated that Mayo's father whipped him. On federal habeas review, the district court, "having reviewed the record and questioned the Petitioner personally, determined that the Petitioner is familiar with *Penry v. Lynaugh* and has no additional evidence regarding mitigating circumstances to offer." On appeal and in response to the petition for rehearing, Mayo does not articulate, except in a conclusory manner, how the jury was unable to express its reasoned moral response and give effect to his mitigating evidence.[7]

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[5] *Wainwright v. Sykes*, 433 U.S. 72, 84, 97 S.Ct. 2497, 2505, 53 L.Ed.2d 594 (1977).

[6] *King v. Lynaugh*, 868 F.2d 1400, 1406 (5th Cir.1989) (Rubin, J. concurring), *cert. denied*, ___U.S.___, 109 S.Ct. 1576, 103 L.Ed.2d 942 (1989); *id.* at 1408 (Johnson, J. concurring).

[7] *See e.g., King*, 868 F.2d at 1405; *Bell v. Lynaugh*, 858 F.2d 978, 985 (5th Cir.1988). *cert. denied*, ___U.S.___, 109 S.Ct. 3262, 106 L.Ed.2d 607 (1989), *effect of order denying writ*

(footnote continued on next page)

For these reasons, the petition for rehearing is DENIED.

(footnote continued from previous page)
suspended pending disposition of petition for rehearing, 1989 U.S. Lexis 3489 (U.S. Aug. 2, 1989).

APPENDIX D

Randy Dale MAYO,
Petitioner-Appellant,
v.
James A. LYNAUGH, Director,
Texas Department of Corrections,
Respondent-Appellee.

No. 89-1127.

United States Court of Appeals, Fifth Circuit.

June 30, 1989.

Appeal from the United States District Court for the Northern District of Texas.

Before RUBIN, KING and HIGGINBOTHAM, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

A Texas state prisoner, sentenced to death by lethal injection, seeks habeas corpus relief, alleging three grounds of error in the guilt phase of his trial and two grounds of error in the sentencing phase. After reviewing the record, we find no violation of Mayo's constitutional rights and, therefore, affirm the judgment of the district court denying his writ.

I.

On April 13, 1984, the body of Kimberly Sue Reeves was found next to a concrete support of a bridge crossing over Lake Nasworthy in Tom Green County, Texas. An autopsy established that Reeves had died as a result of a blow to her skull with a blunt instrument.

She had also been stabbed in the neck and abdomen and raped.

Randy Dale Mayo was arrested that evening at a drive-in restaurant in San Angelo on an unrelated capital murder warrant from Lubbock County, Texas. After his arrest, Mayo orally confessed to the murder of Reeves and signed a written statement. Mayo then accompanied the police to the scene of the crime and led them to the jack stand used as the murder weapon. Upon his return to the police station, Mayo signed another written confession.

On January 28, 1985, a jury in the 51st Judicial District Court of Toms [sic] Green County, Texas, convicted Mayo of capital murder while in the course of committing an aggravated sexual assault. After a separate sentencing hearing, the jury returned affirmative answers to the special issues submitted pursuant to the Texas capital sentencing statute[1] and the court sentenced Mayo to death by lethal injection. On direct appeal, the Texas Court of Criminal Appeals affirmed the conviction and sentence.[2] Subsequently, the trial court set Mayo's execution date for August 13, 1986.

On August 6, Mayo filed in the Texas trial court a motion for a stay of execution, a motion to recall the warrant of execution, and an application for a writ of habeas corpus. The motions were denied.

Two days before his scheduled execution, Mayo filed a motion for a stay of execution and for a writ of habeas corpus in the United States District Court for

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[1] Tex.Crim.Proc.Code Ann. art. 37.071(b).

[2] *Mayo v. State,* 708 S.W.2d 854 (Tex.Crim.App. 1986) (en banc).

the Northern District of Texas, San Angelo Division. The court stayed the execution on August 11, 1986.

Two hearings were held before a United States Magistrate. Before the first hearing on November 18, 1986, Mayo personally moved to amend his petition to assert claims of ineffective assistance of counsel. The magistrate allowed Mayo's counsel, who had represented him at trial, on appeal, and in the habeas proceedings, to withdraw; he then continued the hearing, appointed new counsel to represent Mayo, and allowed Mayo to amend his petition. A second evidentiary hearing was held on April 13, 1987. On September 16, 1988, the magistrate issued a report and recommendation that the writ be denied.

After the state had waived its right to seek exhaustion in state court, the district court granted Mayo leave to file an amended petition asserting a claim, based on *Penry v. Lynaugh*,[3] that the Texas capital sentencing statute is unconstitutional. The court held a hearing to determine whether Mayo had additional evidence regarding mitigating circumstances. On February 1, 1989, the court rejected Mayo's challenge to the Texas capital sentencing statute, adopted the findings and conclusions of the magistrate, denied the writ of habeas corpus and vacated the stay of execution.

The district court granted Mayo's certificate of probable cause to appeal and this appeal followed.

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[3] 832 F.2d 915 (5th Cir.1987), *cert. granted in part*, ___U.S.___, 108 S.Ct. 2986, 101 L.Ed.2d 930 (1988).

II.

Mayo contends that the trial court violated his rights to due process and a trial by jury by failing to comply with state law in swearing the jury. First, he claims that the court erred in swearing the jurors individually, rather than collectively.[4] The district court properly characterized this claim as frivolous. We do not sit to review state law[5] and find no federal constitutional violation in the alleged error.

Second, Mayo asserts that the court failed to follow §12.31 (b) of the Texas Penal Code in not asking the jurors to state under oath that "the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact."[6] This provision, although available to both defendants and prosecutors, primarily allows prosecutors to eliminate for cause potential jurors whose scruples against capital punishment will affect their deliberation of fact issues.[7] In *Adams v. Texas*, the Supreme Court reversed a death sentence on the basis that striking jurors under section 12.31(b) violates the *Witherspoon* doctrine[8] because it permits the exclusion of jurors who would be "affected" by the possibility of the death penalty, but who nevertheless could still follow the court's

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[4] *See* Tex.Crim.Proc.Code Ann. art. 35.22.

[5] *Smith v. Phillips*, 455 U.S. 209, 221, 102 S.Ct. 940, 948, 71 L.Ed.2d 78 (1982).

[6] *See* Tex.Penal Code Ann. § 12.31(b).

[7] *See Adams v. Texas*, 448 U.S. 38, 48-49, 100 S.Ct. 2521, 2528, 65 L.Ed.2d 581 (1980).

[8] *See Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

instruction and obey their oaths.[9] If §12.31 had been used to exclude jurors, Mayo would have a constitutional claim. Failure to use it gives rise to none.

III.

Mayo contends that the oral confession and the two written confessions admitted at trial were obtained in violation of his Fifth Amendment right against self-incrimination and his Sixth Amendment right to assistance of counsel because the statements were taken after Mayo told the police that he wanted a lawyer and after the police had promised leniency in exchange for his confession.

At an evidentiary hearing before the trial court on the admissibility of the confessions, the state called as witnesses five police officers involved in arresting, questioning, or detaining Mayo and the person Mayo called from jail. Mayo testified for himself and called as witnesses the police officer who drove him from the site of the arrest to the city jail, a relative, and a friend. The court made a written finding that the confessions were voluntary. Specifically, the court found that the defendant initiated the interview leading up to the confessions, the police gave the defendant *Miranda* warnings on three different occasions, the defendant was informed of his right to an attorney and expressly waived it, and the police officers did not promise the defendant leniency in exchange for his statements. These factual findings, if correct, are sufficient to

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[9] *Adams*, 448 U.S. at 49, 100 S.Ct. at 2528.

defeat Mayo's claims that the confessions should be suppressed.[10]

State-court determinations of the ultimate question whether a confession is voluntary are not binding in a federal habeas corpus proceeding.[11] Subsidiary factual questions, however, are entitled to the presumption under 28 U.S.C. § 2254(d) that a state court's written determinations made after a hearing on the merits are correct.[12] The findings that Mayo initiated contact with the police and that the police did not promise leniency, determinations that involve the credibility of witnesses and turn largely on an evaluation of demeanor, are subsidiary factual issues entitled to this presumption of correctness.[13] Furthermore, we agree with the district court that those findings are supported by the record. As Mayo offered nothing to establish that the factual determinations by the state court were erroneous, we find no error.

IV.

To prevail on his claim that his attorneys at trial and on appeal rendered ineffective assistance of counsel in violation of the Sixth and Fourteenth

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[10] *See Edwards v. Arizona*, 451 U.S. 477, 485, 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378 (1981) (Fifth Amendment requires that defendant initiate communication with police once he invokes his right to counsel); *Patterson v. Illinois*, ___U.S.___, 108 S.Ct. 2389, 2395, 101 L.Ed.2d 261 (1988) (waiver of Sixth Amendment right to counsel valid when *Miranda* warnings given).

[11] *Miller v. Fenton*, 474 U.S. 104, 109, 106 S.Ct. 445, 451, 88 L.Ed.2d 405 (1985).

[12] *See id.*

[13] *Id.* at 117, 106 S.Ct. at 453.

Amendments, Mayo must show that counsel's performance was deficient and that the deficient performance prejudiced the defense.[14] A "court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct."[15] "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[16] The burden of proving either element is heavy as counsel is strongly presumed to have rendered adequate assistance and exercised reasonable professional judgment.[17]

Mayo's specific allegations are that counsel (1) failed to exercise peremptory challenges to jurors Gus Edwin Young and Harvey Leon Reeves, who Mayo alleges indicated that they would automatically impose a sentence of death if he were found guilty, (2) did not call Assistant District Attorney Tom McCoppin to testify concerning the alleged promise of leniency, and (3) did not raise on appeal the issue of the voluntariness of the confessions.

Defense counsel objected to Reeves for cause after he answered affirmatively on voir dire the question whether in all capital murder cases the sentence should be the death penalty. Under further examina-

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[14] *Strickland v. Washington*, 466 U.S. 668, 692, 104 S.Ct. 2052, 2052, 2067, 80 L.Ed.2d 674 (1984).

[15] *Id.* at 690, 104 S.Ct. at 2066.

[16] *Id.* at 694, 104 S.Ct. at 2068.

[17] *Kirkpatrick v. Butler*, 870 F.2d 276, 280 (5th Cir.1989).

tion by the state, Reeves explained that he misunderstood counsel's question and that if the state failed its proof during the sentencing phase of the trial he would vote "no" on the special issues. The court overruled the challenge. Defense counsel further examined Reeves on the issue, then asked for a moment to consult. The record does not indicate with whom the attorney spoke, but afterwards he accepted Reeves. Defense counsel also objected to Young after he gave conflicting answers to the question whether he would automatically answer the special questions in the sentencing phase so that the defendant would get the death penalty. No ruling was ever made or demanded on the objection. After the state and the defense counsel further questioned Young, both accepted him.

We do not find counsels' conduct deficient. Because the trial court had rejected their challenges for cause, Mayo's attorneys were left with the tactical decision whether to exercise peremptory challenges to the two jurors. The jurors had stated that they had been confused by the initial questions and that they would vote "no" on the special questions if the prosecution did not carry its burden of proof. During the second hearing before the magistrate, Mayo's trial counsel testified that "with Mr. Young and Mr. Reeves we wanted them as jurors after it was clear that they didn't really mean what they said in answer to that first question [that they would automatically vote for death] . . . we felt like by the response to the other answers that they would be good jurors." We fail to see how counsels' decision to believe that the venire members would be fair and impartial was unreasonable.

Mayo also contends that counsel was deficient during the hearing to suppress the confessions in not calling Assistant District Attorney Tom McCoppin to testify concerning the alleged promise of leniency.

"Complaints of uncalled witnesses are not favored in federal habeas review because allegations of what a witness would have testified are largely speculative.[18] Nothing in the record supports Mayo's contention that McCoppin would have testified that Detective Ward promised Mayo that in exchange for a murder confession, he would not be prosecuted for capital murder. Mayo presented no evidence on this claim at his hearings before the magistrate. Detective Ward and Officer Grosshans, who were present when Mayo gave his confessions, testified at the state court hearing that no deals had been made. McCoppin was a member of the team that prosecuted Mayo on the theory that he voluntarily confessed. Counsel could have reasonably assumed that McCoppin would not testify favorably to Mayo.

Mayo's final ineffective-assistance claim is that counsel should have raised on appeal the issue of the voluntariness of the confessions. Counsel is not required to urge on appeal every nonfrivolous ground that might be raised.[19] It is not only reasonable but effective for counsel on appeal to winnow out weaker arguments and focus on a few key issues.[20] Only Mayo's own testimony supported his contention that his confessions were given in violation of his rights. It was reasonable for counsel to assume that the appellate court would not find erroneous the trial

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[18] *Lockhart v. McCotter*, 782 F.2d 1275, 1282 (5th Cir.1986), *cert. denied*, 479 U.S. 1030, 107 S.Ct. 873, 93 L.Ed.2d 827 (1987).

[19] *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987 (1983).

[20] *See id.* at 751-52, 103 S.Ct. at 3313.

court's factual determination, after a full hearing, that there was no coercion and no deal for leniency.

V.

Mayo contends that an unlawful communication between a juror and a witness during the sentencing phase of the trial violated the Texas Code of Criminal Procedure[21] and denied him his Sixth Amendment right to a fair and impartial jury. To the extent that Mayo asserts that the communication between the juror and a witness contravened state law, he fails to state a claim for relief in federal habeas corpus.[22] We therefore address only his Sixth Amendment claim.

On January 30, 1985, after testimony at the punishment phase of trial was concluded, the jury foreman, Dennis J. Potter, telephoned Raymond L. Allison, one of Mayo's witnesses at the punishment phase and an acquaintance of Potter's, to discuss Allison's testimony that Mayo's life should be spared. After the jury had returned its verdict on punishment, Mayo learned of this conversation and filed a motion for new trial alleging jury misconduct. The trial court, after an evidentiary hearing, denied relief. The state appeals court affirmed.

The federal district court found the determinations of the state trial and appeals court inadequate in their findings of fact and thus did not accord them the presumption of correctness given in federal habeas to written findings by a state court after a hearing on the merits.[23] As Mayo did not offer any additional evidence

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[21] Tex.Crim.Pro.Code Ann. §36.22.

[22] *See* 28 U.S.C. §2254(a).

[23] 28 U.S.C. §2254(d).

on the issue at his federal evidentiary hearings, the district court reviewed the record of the state hearing. Applying the standard we set out in *Miller v. Estelle*,[24] the court concluded that Mayo did not carry his burden of demonstrating that Potter's contact with Allison prejudiced the jury at the sentencing phase of his trial.

We may set aside the district court's determination only if it is clearly erroneous.[25] The magistrate's report, which was adopted by the district court, extensively reviewed the testimony at the state evidentiary hearing. John Michael Anderson, a juror at Mayo's trial, testified for the state that there was no discussion during the jury deliberations of the telephone conversation between Potter and Allison and no reference to anything outside the record. Thus the only juror possibly influenced by the conversation was Potter himself. Potter testified that Allison's trial testimony caused him to reconsider his decision that there was nothing mitigating or redeeming about Mayo. Allison testified that he and Potter reviewed Allison's testimony in support of Mayo and that, in addition, Allison said he thought that Mayo's mother was "full of demons," which made her look old. Since this observation went beyond Allison's testimony at trial, the court considered its possible effect on Potter, although he did not remember the "demons" comment. The court concluded that because the comment could just as easily be construed as mitigating evidence of an unfortunate childhood or as aggravating evidence that he took after his mother, Mayo had not carried his

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[24] 677 F.2d 1080 (5th Cir.) (defendant bears burden of demonstrating harmfulness of third party contacts with the jury during sentencing phase of trial), *cert. denied*, 459 U.S. 1072, 103 S.Ct. 494, 74 L.Ed.2d 636 (1982).

[25] Fed.R.Civ.P. 52(a).

burden in showing that this evidence prejudiced the jury. This conclusion is supported by the record and is not clearly erroneous.

VI.

Mayo contends that the Texas capital sentencing statute violates the Eighth and Fourteenth Amendments because the jury was precluded from giving effect to all the mitigating evidence submitted during the sentencing phase of his trial. Mayo had not objected to the jury charge at trial. After the magistrate had issued his report, the court allowed Mayo to amend his habeas petition to assert a new claim based on the Supreme Court's decision in *Franklin v. Lynaugh*[26] and the granting of certiorari in *Penry v. Lynaugh*.[27] The district court held a hearing, after which "the Court, having reviewed the record and questioned the Petitioner personally, determined that the Petitioner is familiar with *Penry v. Lynaugh* and has no additional evidence regarding mitigating circumstances to offer." The court then denied relief on Mayo's *Franklin-Penry* claim.

Under Texas law, if a jury finds the defendant guilty of a capital offense, the trial court holds a separate sentencing proceeding at which a wide range of additional evidence in mitigation or aggravation is admissible. Pursuant to the Texas sentencing statute, the jury is required to answer the following questions based on evidence adduced during either phase of the trial:

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[26] ___U.S.___, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988).

[27] 832 F.2d 915 (5th Cir.1987), *cert. granted in part*, ___U.S.___, 108 S.Ct. 2896, 101 S.Ct. 930 (1988).

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit acts of violence that would constitute a continuing threat to society.[28]

The state has the burden of proving beyond a reasonable doubt that the questions should be answered affirmatively. If the jury so answers both the questions, as was done in Mayo's case, the trial judge must sentence the defendant to death.

Mayo contends that the Texas capital punishment scheme is unconstitutional because the jury is prevented from considering mitigating evidence except on the issues of the deliberateness of the murder and the probability of future dangerousness. We are bound by the precedents of this circuit that have upheld the constitutionality of the Texas statute,[29] and therefore we must deny relief on this claim. That the Supreme Court has granted certiorari in a particular case does not allow us to grant relief to relief to other petitioners who raise a similar claim.[30]

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[28] Tex.Crim.Pro.Code Ann. art. 37.071(b). The third statutory question concerning provocation is not relevant to this case.

[29] *See, e.g., Graham v. Lynaugh*, 854 F.2d 715 (5th Cir.1988); *Williams v. Lynaugh*, 837 F.2d 1294, 1298 (5th Cir.1988)(per curiam).

[30] *See Bell v. Lynaugh*, 858 F.2d 978, 984 (5th Cir.), *stay granted*, ___U.S.___, 109 S.Ct. 254, 102 L.Ed.2d 243 (1988); *Wicker v. McCotter*, 798 F.2d 155, 157-58 (5th Cir.1986).

For the foregoing reasons, we deny habeas relief. The judgment of the district court is AFFIRMED.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

RANDY DALE MAYO,	§
	§
Petitioner,	§
	§
vs.	§ **CIVIL ACTION NO.**
	§ **6-86-0080-K**
	§
JAMES A. LYNAUGH,	§
Director, Texas Dept.	§
of Corrections,	§
	§
Respondent.	§

ORDER

The Petitioner, Randy Dale Mayo, is incarcerated in the Ellis No. 1 Unit of the Texas Department of Corrections, Huntsville, Texas, having been convicted of capital murder and sentenced to death by lethal injection. The petitioner filed a Petition for Writ of Habeas Corpus in this Court, and the case was assigned to United States Magistrate J.Q. Warnick, Jr. for review. The Magistrate held two evidentiary hearings and submitted a written Report and Recommendation to the Court on September 16, 1987. No objections were filed within ten days of service of the Report and Recommendation as provided therein.

Petitioner filed a Motion to Set Aside Magistrate's Recommendation and for leave to Amend Pleadings on October 21, 1987, more than a month

after the Report was filed. On December 12, 1988, a hearing was held before United States District Judge David O. Belew, Jr. in San Angleo, Texas. The Court, having reviewed the record and questioned the Petitioner personally, determined that the Petitioner is familiar with *Penry v. Lynaugh* and has no additional evidence regarding mitigating circumstances to offer. The State waived its right to seek exhaustion in state court, whereupon the Court granted Petitioner leave to file his Second Amended Petition for Writ of Habeas Corpus.

The Petitioner filed his Second Amended Petition for Writ of Habeas Corpus on December 20, 1988. Respondent filed a Motion for Summary Judgment on January 3, 1989. The Court, having considered the pleadings and motions on file, as well as the applicable law, is of the opinion that the Motion should be GRANTED.

It is therefore ORDERED that the findings, conclusions and recommendations of the United States Magistrate be and are hereby adopted.

It is further ORDERED that Respondent's Motion for Summary Judgment be and is hereby GRANTED.

It is further ORDERED that the Stay of Execution granted by this Court on August 11, 1986 be and is hereby WITHDRAWN.

The Clerk is hereby directed to mail a copy of this order by certified mail, return receipt requested, to (1) Petitioner, (2) Attorney for the Petitioner, (3) Attorney for the Respondent and (4) a copy of this Order and of the Report and Recommendation of the

United States Magistrate to the Presiding Judge of the 51st District Court of Tom Green County, Texas.

IT IS SO ORDERED.

SIGNED this ____ day of February, 1989.

_____

DAVID O. BELEW, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS SAN ANGELO DIVISION

RANDY DALE MAYO,
Petitioner,

v.
CA-6-86-0080

JAMES A. LYNAUGH, Director,
Texas Dept. of Corrections,
Respondent.

REPORT AND RECOMMENDATION

The Petitioner, Randy Dale Mayo, is incarcerated in the Texas Department of Corrections under sentence of death.

Mayo was indicted by a Grand Jury in the 51st District Court of Tom Green County, Texas, on the 4th day of May, 1984. Mayo was charged with the offense of capital murder while in the course of committing aggravated sexual assault, Sections 19.02 (a)(1) and 19.03 (a)(2), Texas Penal Code. The date of offense was April 13, 1984. Mayo was represented by appointed counsel.

Jury selection in the case was done by individual voir dire examination, Article 35.17, 2., Texas Code of Criminal Procedure. Jury selection began on January 16, 1985. The selection process continued until January 23, 1985, when it was completed with the seating of two (2) alternate jurors. Testimony started on January 24, 1985. The Court delivered its Guilt/Innocence Charge to the jury on January 28, 1985. The jury found

Mayo "Guilty" of capital murder as charged in the Indictment.

The Punishment Phase of the trial commenced on January 29, 1985. With the completion of the evidence the Court's Charge on punishment was given to the jury on January 31, 1985. The jury unanimously answered in the affirmative to the two (2) issues submitted. Under Article 37.071, Texas Code of Criminal Procedure, two (2) issues only, but as required by the Texas law were submitted. The Judgment, thus, for punishment was death. Judgment was entered based on the jury's verdict on January 31, 1985. As further provided in Texas law no formal sentencing was done at that time. Where the sentence is death there is an automatic appeal to the Texas Court of Criminal Appeals, Article 37.071 (h), supra. No sentences are imposed in Texas death penalty cases until an appellate decision affirming the conviction and punishment has been rendered, Article 42.04, Texas Code of Criminal Procedure.

The conviction and punishment of death was affirmed by the Texas Court of Criminal Appeals on April 30, 1986, in an en banc Opinion, see 708 S.W.2d 854. A Mandate was issued from the Court of Criminal Appeals on May 16, 1986. On June 4, 1986, the Trial Court sentenced Mayo to death by lethal injection and set his date of execution before the hour of sunrise on Wednesday, August 13, 1986. Following a recommendation by the Trial Court the Texas Court of Criminal Appeals on August 11, 1986, denied a Motion for Stay of Execution as sought by Mayo.

This Court granted a Stay of Execution on August 11, 1986. Two (2) Evidentiary Hearings have been held by the undersigned U. S. Magistrate. The

first was on November 18, 1986, and a second on April 13, 1987.[1]

On April 13, 1984, the victim's body was found next to a concrete support of a bridge crossing over part of Lake Nasworthy. The lake is located in Tom Green County, Texas. The victim had died as the result of blows to her skull with a blunt instrument. She was last seen alive by college students at 10:30 A.M. on that day. She had also suffered stab wounds, but the autopsy opinion was that they would not have caused

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[1] The expeditious progress of this case in this Court has been plagued by lawyer problems and medical problems of the U.S. Magistrate. Kirk Hawkins, who was the original attorney in the Trial Court and on appeal in the State Courts, started representing Mayo in this Court. However, it became apparent at the first Evidentiary Hearing that there was a conflict of interest in representation since part of the grounds Mayo was raising was ineffective assistance of his trial counsel. Hawkins thus became his own accuser and cross-examiner. Barbara Walther was then appointed to represent Mayo. She represented him at the second Evidentiary Hearing. Just as it came time to prepare the Brief of Authorities, Ms. Walther was appointed the Master for the District Courts of Tom Green County, Texas. As such she was prohibited by State law from the practice of law. Yet a third lawyer was appointed. That lawyer refused and a Hearing was essential to determine whether he could remove himself from the case. An Order was entered by the undersigned Magistrate removing him but not granting his Motion to be allowed to withdraw. That matter was referred to the State Bar Grievance Committee. Prior to that Hearing the Magistrate handling this case suffered a cardiac problem and had open heart surgery. Finally, Mr. Bradley Miles was appointed as the lawyer to represent Mayo. Just as he was about to review all of the records and send in any additional authorities he thought were necessary, he suffered medical problems of his own and ended up in the hospital. Therefore, the unfortunate problems with lawyers and those of the undersigned Magistrate have caused this case to be delayed beyond the regular decision date of cases pending in this United States District Court.

death under ordinary circumstances. A vaginal examination revealed the presence of sperm.

Mayo was arrested at a drive-in restaurant in San Angelo that same evening. His arrest was completely unrelated to the case at bar. His arrest was based upon another *capital murder* warrant from Lubbock County, Texas. After being arrested Mayo gave two (2) written confessions to the present offense. Mayo also led the police to the place where the blunt instrument used to crush the skull of the victim had been abandoned. The blunt instrument was a jack stand.

Mayo as the Petitioner for a Writ of Habeas Corpus in this Court has raised twelve (12) grounds of error. Those grounds of error are as follows;[2]

1. Petitioner was deprived of a trial by a fair and impartial jury as a result of unauthorized communications between a juror and one of the witnesses. Said communication occurred prior to the juror's deliberations on the punishment phase of the trial in violation of Article 36.22 of Vernon's Ann. Code of Criminal Procedure and in violation of Petitioner's constitutional rights to a fair and impartial as guaranteed trial under the Texas Constitution, Article One, Section Ten and the 6th Amendment to the Constitution of the United States.

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[2] Following the second Evidentiary Hearing an "Order for Amended Pleadings and Briefs" was entered on May 14, 1987. Permission was granted to Mayo to raise two (2) additional grounds of error, but no such pleading has been filed. Mayo had already filed an Amended Petition on March 27,1987.

2. The introduction into evidence of two confessions and one oral confession made by Mr. Mayo to officers of the San Angelo Police Department violated Petitioner's right against self-incrimination as guaranteed under the 5th Amendment of the United States Constitution in that said confessions and statements were taken in violation of Petitioner's right to counsel as guaranteed by the 6th Amendment of the United States Constitution.

3. Petitioner was deprived of his constitutional right against self-incrimination guaranteed by the 5th and 14th Amendments to the United States Constitution and by the Texas Constitution, Article One, Section Ten when Petitioner was unduly influenced into giving a confession by promises of leniency and promises of benefit by Detective Ward.

4. The trial court committed fundamental error by failing to swear the jury collectively prior to the commencement of the evidence or at any time during the "trial". Said failure violated Article 35.22 of V.A.C.C.P. and additionally denied Petitioner his right to a trial by jury as guaranteed under the United States Constitution and the Texas Constitution. Such failure to swear jury constituted fundamental error.

5. The trial court committed fundamental error by failing to qualify the prospective jurors by either swearing them in accordance with the oath prescribed in Sec.

12.31 of the Texas Penal Code or in the alternative, by failing to ask them while under oath the question required in Sec. 12.31 of the Texas Penal Code.

6. That the trial court committed error in allowing Juror Coleman to be dismissed from jury service. Said dismissal was error even though all parties consented because Juror Coleman, after having been duly sworn was not disqualified from service under any of the required disqualifications for service.

7. The trial court erred in not excusing for cause Juror Gus Edwin Young.

8. That the trial court erred in not excusing for cause Juror Harvey Leon Reeves.

9. Petitioner was denied a fair trial in that his trial counsel acted incompetently by failing to exercise peremptory challenges on Juror Gus Edwin Young and Juror Harvey Leon Reeves.

10. Petitioner was deprived his right of his constitutionally guaranteed right to effective assistance of counsel as guaranteed by the United States Constitution Amendments 6, 8 and 14. Said denial of effective assistance consisted of failure of his court appointed attorneys to raise the issue of the legality of the confession in his Appeal to the Court of Criminal Appeals of Texas.

11. Petitioner Mayo was denied effective assistance of counsel in that counsel failed

to adequately or fully develop testimony upon cross-examination of the following witnesses:

Billy Ward, LeeAnn Coulter, Sam Halstead, Cindy Porter, Teresa (Neyra) Hilderbrand, Raymond Naron, Don Ward and Michael Valles. Said failure by appointed counsel to adequately cross-examine or in the alternative to present additional evidence to counter testimony by the above witnesses denied Petitioner of his right to a fair trial.

12. Petitioner Mayo was denied effective assistance of counsel when his counsel failed to call Assistant District Attorney Tom McCoppin as a witness with regards to whether or not a "deal" was discussed in exchange for Petitioner's confession.

EXHAUSTION OF STATE COURT REMEDIES

There is a doctrine known as "comity". As applied to this situation it requires that the State Court be afforded the opportunity to determine both the factual and legal issues before Petitioner is permitted to come before a Federal Court seeking a Writ of Habeas Corpus. The doctrine has been both Court and Statutorily mandated under the euphemism of "the exhaustion doctrine". This simply means that the Petitioner must have provided to the Courts of the State a fair opportunity to apply the controlling Federal Constitutional legal principles to the facts that bear upon his Constitutional claim, *Picard v. Connor*, 404 U.S. 270 (1971), *Rose v. Lundy*, 455 U.S. 509 (1982), *Anderson v. Harless*, 459 U.S. 4 (1982), *Brown*

v. Estelle, 701 F.2d 494 (5th Cir. 1983) and 28 U.S.C. 2254 (b) and (c).

The Respondent contends that some of the grounds as asserted have not been exhausted in the State Courts. Based upon the Respondent's *own* conclusion that because the unexhausted complaints involve *only* questions of law or issues that can be resolved from the record, the Respondent in his *Amended Motion to Dismiss and Answer* expressly waived the exhaustion requirement by stating "...the State waives the exhaustion requirement as to them as well." It is possible for the exhaustion requirement to be waived since it is not jurisdictional, but rather procedural, *Granberry v. Greer*, ___ U.S. ___, 107 S. Ct. 1671 (1987), *McGee v. Estelle*, 704 F.2d 764 (5th Cir. 1983), panel rev'd 722 F.2d 1206, 1212 (5th Cir. 1984) (en banc), remanded to panel on other grounds, 732 F.2d 447 (5th Cir. 1984).

GROUND OF ERROR NUMBER ONE

> Petitioner was deprived of a trial by a fair and impartial jury as a result of unauthorized communications between a juror and one of the witnesses. Said communication occurred prior to the juror's deliberations on the punishment phase of the trial in violation of Article 36.22 of Vernon's Ann. Code of Criminal Procedure and in violation of Petitioner's constitutional rights to a fair and impartial as guaranteed trial under the Texas Constitution, Article One, Section Ten and the 6th Amendment to the Constitution of the United States.

Mayo at the punishment phase of his trial called as a witness in his behalf Mr. Raymond L. Allison. Mr.

Allison owned and operated a gasoline service station in San Angelo, Texas. He had hired Mayo's father to work for him in about 1972 or 1973. Mayor's father had worked for Allison until 1975. Mayo's father was a mechanic. Allison testified that because the family had no place to live he purchased a house and rented the house to the Mayo family. Mr. Allison testified that Mayo's mother and father had considerable marital difficulties and had some arguments at his place of business until he stopped it. It was his opinion that the family environment was bad and that was a major part of the reason why Randy Mayo found himself on trial for his life. He knew Mayo when he was a teenage boy around the station, where Mayo did some work, was paid for it and seemed like a nice young man. He testified that one (1) occasion the father inflicted an excessive punishment on Mayo when it really was the father who should have been punished. Allison also testified that at one period the brothers and sisters of Mayo showed up at school with beating marks and the children were taken away from the family by the State of Texas and not returned until the house was cleaned up, etc. Mr. Allison was obviously a religious person, attended church on a regular basis and attempted to get Mr. Mayo and Randy Mayo to go to church with him in hopes that Christianity would change their lives for the better. He lost contact with them after 1975 and had only casual meetings after that date. He in effect asked they jury to spare Mayo's life. Allison felt something good would result from a term in prison, since Mayo would there be given an opportunity to improve himself.

Allison's son, Kelly Andrew Allison, also testified. He described Randy Mayo's mother as a bad evil person.

Mr. Allison and his son were the last two (2) witnesses to testify at the Punishment phase of the case. Following that both sides rested and closed. The Allisons' testified on January 30, 1985.

Mr. Dennis J. Potter had already been selected as the Presiding Juror. He had signed the verdict on Guilt/Innocence as Presiding Juror of the jury. Following the closing testimony of the Allisons' Court recessed until the next day, January 31, 1985. The Court on the next morning presented the Charge on Punishment.

Mr. Potter was a long standing friend of Mr. Raymond Allison. Mr. Potter's father and the Potter family attended the same church as Mr. Allison. They knew each other from the church. Potter had in the church setting counseled with Allison on occasion about his own problems. Mr. Potter, on the evening of January 30th and before the Punishment Charge and Verdict, called Mr. Allison on the phone. He and Mr. Allison had a discussion about Randy Mayo.

This fortuitous information about this conversation came to the attention of the attorneys from Mr. Allison (see affidavit attached to Motion for New Trial, TR. 189-190), and they did in the Motion for New Trial allege this as one (1) of the grounds for setting aside the verdict. Under Texas law if there is a conversation by a juror with an unauthorized person concerning the testimony and the case itself, then there is a presumption that there was injury to the defendant, *Williams v. State*, 463 S.W.2d 436 (Tex. Cr. App. 1971) and *McMahon v. State*, 582 S.W.2d 786 (Tex.Cr.App. 1978), cert. den. 444 U.S. 919, cert. reh. den. 444 U.S. 985.

An Evidentiary Hearing was held on Mayo's Motion for a New Trial based upon the presumptively harmful conversation that took place between the pre-

siding juror, Potter, and the witness, Allison. The State also called as a witness, Mr. John Michael Anderson, who was a juror at the Mayo trial. He testified that there was no discussion of the telephone conversation by Dennis Potter with Mr. Allison nor reference to anything outside the record during the jury deliberations.

Mr. Allison testified that it was Mr. Potter who called him. Mr. Potter will testify also at the Motion for New Trial and will verify that it was he who initiated the phone conversation. Mr. Allison's general recollection of the conversation is that they reviewed his testimony. Potter told him that until Allison's testimony he had made up his mind and stated until Allison's testimony there was nothing mitigating or redeeming known with regard to Randy Mayo. In effect, he was saying he had been prepared to answer the Texas questions, thus resulting in a verdict for punishment of death. Potter indicated to Mr. Allison that he appreciated his testimony since it gave a new insight into Randy Mayo with regard to his beginnings and something good was said about him by Mr. Allison. According to Allison, he commented to Potter that he saw Randy Mayo's mother in the courtroom and she looked like she was full of demons and in effect what a bad person she was. Mr. Potter testified and recalled the gist of the entire conversation. He did remember the mother was mentioned. He did not "remember" the demons comment, but did not deny its having been said. He did say that Mr. Allison asked him to give life as opposed to death to Randy Mayo. Potter didn't remember anything detrimental being said about Randy Mayo.

At the end of the hearing on the Motion for New Trial and following the arguments of counsel the Trial Judge stated he acknowledged harm was presumed, but it was a rebuttable presumption. The Judge concluded that based on all of the testimony, even

though the burden was on the State, the presumption had been overcome. The Court opined as follows, "there is no doubt in my mind that *whatever happened in the unauthorized communication* did not harm the defendant and, if anything, helped the defendant." (Emphasis Added). The written Order simply overrules the Motion For New Trial without making any findings or conclusions.

The Respondent has taken the position that the Judge's findings are to be accorded a presumption of correctness. Without reciting all of the cases that have to do with that presumption, it is sufficient to say that when proper Findings of Fact are made by a State court, whether trial or appellate, they are entitled to a presumption of correctness, *Sumner v. Mata*, 449 U.S. 539 (1981), and 28 U.S.C. 2254 (d). However, the Respondent overlooks the key part of what he has termed the findings of the Trial Court. The Trial Court said, and it is emphasized here to show that there are no Trial Court findings in this case, "...*THAT WHATEVER HAPPENED*...". In effect the Trial Court made a statement that it was making no findings. The Trial Court moved outside of the presumption of correctness circle with its "whatever happened in the unauthorized communication". The Trial Judge did not state how far he credited and to what extent, if any, he discounted or rejected any testimony in evidence before him. There must be an adequate determination within the meaning of 28 U.S.C. 2254 (d) that would entitle a State Court's findings to a presumption of correctness, *LaVallee v. Delle Rose*, 410 U.S. 690 (1973).

The Trial Court said that whatever happened "helped the Defendant." That conclusion is difficult to credit. The choices the jury faced at the moment of the conversation for Randy Mayo were to impose a sentence of life or a penalty of death. Randy Mayo received

the penalty of death. Therefore, no help came from that conversation for Randy Mayo.

Mr. Potter's testimony was that the only discussion in the phone conversation basically was the testimony that Mr. Allison had given that day in Court. Mr. Potter stated to Allison that he was going to rethink his position because of Mr. Allison's testimony.

Potter did say that Mr. Allison mentioned Randy Mayo's mother once (SF Vol. XXII, pg. 29-30). He stated that Mr. Allison told him that she was "a very unpleasant woman." He was asked if there was any talk about her appearance or how she seemed during the trial and his response was, "not to my recollection, Sir." (id. pg. 30).

The status of the record at that point had an outstanding hypothesis. Mr. Allison had testified that he told Mr. Potter that Randy's mother looked like she was full of demons and in effect that she was a bad woman. Mr. Potter did not state unequivocally that those things were never said, he simply had no recollection about Mr. Allison saying anything in the conversation concerning her appearance or the demon like look. Such comments would be evidence/opinions not introduced during the trial. The presumption that seems to have been made with regard to this testimony is it had one effect only and only one possible effect. The presumption being that the comment about the bad mother was mitigating evidence in behalf of Randy Mayo. There is normally another side to any coin and most testimony. It might be just as logical to presume that Mr. Potter suddenly decided that like mother like son. Thus, he could have decided that this woman who appeared to be "full of demons", who Mr. Allison had testified would not go to church and was a hindrance to the rest of the family's attending church, had created

her own monster in Randy Mayo. That approach to the evidence would make such comments aggravating. Thus, it is possible that it affected Potter's rethinking to Mayo's detriment when Potter arrived at his final decision in answering the two (2) critical questions.

The presumption of correctness rule applies to the Trial Court findings as well as to Appellate Court findings, *Wainwright v. Goode*, 464 U.S. 78, 85 (1983). The Texas Court of Criminal Appeals opinion specifically dealt with the question of this unauthorized juror conversation at page 856. The Court first said, "Potter, who also testified at the hearing, corroborated this testimony. Both men stated that *everything* stated in the phone call *had been said* at the trial." (Emphasis added). Then later at the same page the Court noted with regard to that telephone call, "the only statement made in the telephone call *that was not said at trial* was that Allison expressed his wish to Potter that Appellate [sic] be given a more lenient sentence than the death penalty." (Emphasis Added). Thus, the first finding by the Appellate Court that nothing was said in the telephone conversation except what had been stated at the trial is now inconsistently found because there was, as acknowledged by the Appellate Court, at least one (1) item in the conversation that had not been stated at the trial. The Appellate Court totally overlooks the testimony of Allison and Potter that part of the conversation, which was not testimony at the trial, had to do with Mayo's mother, and perhaps how she looked. The Appellate Court noted that Allison's plea for a life sentence was totally disregarded. The Appellate Court did not take note of the admitted discussion about the mother, nor consider its potential impact on Potter's verdict. Admittedly, Juror Anderson testified that neither the Potter-Allison conversation nor the substance of such conversation was mentioned during jury deliberations.

The record is, therefore, devoid of any Trial or Appellate Court finding that is entitled to a presumption of correctness with regard to finding of the facts on the unauthorized conversation. The result will thus be based upon Federal law as it applies and controls this sort of a claim.

At this procedural point it is up to Mayo to prove to this Court by a preponderance of the evidence that the jury verdict was influenced by this unauthorized conversation. This is not a case, since it is by collateral attack, like a Direct Appeal in which the verdict is presumed to have resulted from harm. Mayo did not offer additional or new evidence on this point at either Evidentiary Hearing before this Court. Thus, the record made before the Trial Court at the hearing on the Motion for New Trial is the record to be considered. It is plain that the hearing held was one in which credibility could have gone in either direction. However, it is not for this Court to make those credibility decisions unless forced to, *DeLaRosa v. Texas*, 743 F.2d 299 (5th Cir. 1984). However, this contact took place at the Sentencing phase of the trial, see *Miller v. Estelle*, 677 F.2d 1080 (1982), reh. den. and reh. den. en banc (1982), cert. den., 459 U.S. 1072 (1982). The question presented to that Court was whether or not it should extend the doctrine of *Remmer v. United States*, 347 U.S. 227 (1954) to the *Miller v. Estelle*, supra, fact situation. The heavy burden placed upon the government by *Remmer v. United States*, supra, was that the government was required to demonstrate the harmlessness of third party contacts with the jury before the verdict. In *Miller v. Estelle*, supra, the Fifth Circuit was seeking to decide whether or not that burden should be extended to the sentencing phase of the trial. The Court specifically held it should not, *Miller v. Estelle*, id., pg. 1085.

In *Miller v. Estelle*, the Court said at page 1085 as follows,

> "The policy considerations underlying the burden placed on the government with respect to jury tampering prior to conviction are not present at the post-verdict stage. Once found guilty by an untarnished jury, a defendant's presumption of innocence obviously vanishes. The government has nothing more to prove. Instead, it is the defendant who now has every incentive to tamper with the jury, especially when the punishment may be stiff. Placing the burden of overcoming the presumption of prejudice on the government at this stage would only encourage jury tampering. To (Pg. 1086) prevent such sandbagging, it is appropriate that the burden of showing prejudice in this later phase should be placed upon the defendant, at least in situations in which the state is not responsible for the contact. The burden, however, should not be reinforced by a deemed presumption. The defendant may carry this burden by showing that reasonable jurors would have been affected to his prejudice.
>
> Applying this standard to the instant case, we find that the burden was not met. The transcript for the evidentiary hearing ordered below reveals that although some mention of one or more of the three incidents was made in the presence of other jurors prior to the commencement of the punishment phase, there was no discussion of them during jury deliberations. It

> is entirely unpredictable whether the contacts moved the jurors involved to be more harsh or more lenient. All we know is that Miller by no means received the maximum sentence available, and in light of the facts of this case it cannot be said that 60 years was excessive."

The *Miller* Court placed reliance on the fact that the State was not responsible for the contact. That same factor is true in the case at bar. Likewise, the Court placed emphasis on the fact that whatever incidents were mentioned in the *Miller* case were not discussed during jury deliberations. Those same facts seem to be present here since Potter and Anderson both testified that no mention was made during the deliberations. The only factor involved in the *Miller* case is that he did not receive the maximum sentence available although he received a long term and it was found not to be excessive in light of the facts in the case.

There were for Mayo only two (2) possible punishment verdicts. The eleven (11) jurors who never heard of this Allison/Potter conversation unanimously voted to answer the questions affirmatively. It is plain that the evidence was influencing Mr. Potter before he had heard the testimony of the Allisons'. He pledged to rethink his position in light of their conversation. Keeping in mind that it is the burden of Mayo to prove by a preponderance of the evidence that jury was affected and to demonstrate that reasonable jurors would have been affected by that conversation, such is not shown here. While it is possible that the evidence with regard to the mother and the demons could have been construed in an aggravating fashion, it is just as reasonable in light of the record at the hearing on the Motion for New Trial to construe it the other way. Therefore, the Defendant has not carried his burden in

showing that this evidence prejudiced the jury at the Sentencing phase of his bifurcated trial.

The burden was on the State in the Direct Appeal in the State Courts to rebut the presumption of harm from an unauthorized conversation by a juror with someone about the case. However, in this collateral proceeding the burden of proving harm falls on Mayo. There appears to be an outstanding hypothesis with regard to what use might be made of the "mother full of demons" comment. As already noted Mayo has not sustained his burden by showing that it did result in harm. It is just as reasonable to construe its only intended and potential effect was that desired by Allison. Allison intended the comment to prove Mayo was not at fault and avoid a death sentence. While it did not have the desired result, Mayo has failed to prove harm.

GROUND OF ERROR NUMBER TWO AND THREE

> The introduction into evidence of two confessions and one oral confession made by Mr. Mayo to officers of the San Angelo Police Department violated Petitioner's right against self-incrimination as guaranteed under the 5th Amendment of the United States Constitution in that said confessions and statements were taken in violation of Petitioner's right to counsel as guaranteed by the 6th Amendment of the United States Constitution.

Careful trial counsel filed a Motion to Suppress all three (3) confessions. The two (2) grounds alleged in the Motion to Suppress are the same as here. First, trial counsel alleged that Mayo's request for an

attorney was ignored and denied. Second, counsel alleged that there was an agreement with the promise that there would be no capital murder charges if Mayo confessed, (TR- Pgs. 29-30 Vol. I).

The Trial Court held a hearing under *Jackson v. Denno*, 378 U.S. 368 (1964). The evidence at such hearing appears in the Statement of Facts beginning at Page 84, Vol. XV and continuing through Page 219 of Vol. XVI. The State called as witnesses, Sgt. Santiago Garza of the San Angelo Police Department, Officer Frank Hinojos of the San Angelo Police Department and Det. Billy Ward of the San Angelo Police Department. Mayo called as his witnesses Officer Jeff Torbert of the San Angelo Police Department, David Weathersbee, and David Cassles. Randy Dale Mayo also testified. In rebuttal the State called Officer Bruce Grosshans of the San Angelo Police Department, Officer Orlando Cortez a jailer of the San Angelo Police Department and Jimmy Don Daniel. The witnesses at the Motion to Suppress Hearing were not called in a chronological order as related to the events surrounding the confessions. However, their testimony will be reviewed in its logical and factual sequence.

Sgt. Santiago Garza, who had been with the Police Department for fourteen (14) years, was the arresting officer. As already mentioned there was a warrant issued for the Mayo's arrest on a capital murder charge out of Lubbock County, Texas. Officer Garza arrested Mayo at about 7:00 P.M., on April 13, 1984. He identified Mayo by asking him who he was and checking his driver's license. Officer Garza testified there was no conversation relative to an attorney.

Officer Jeff Torbert transported Mayo from the site of the arrest at a Sonic Drive-In to the City Jail. Officer Torbert testified there was included in his

conversation with Mayo some reference to a lawyer. However, he unequivocally testified that Mayo did not ask for a lawyer. Torbert's testimony is as follows, (Pg. 153 Vol. XVI, SF);

"Q. Did you inform him as of -- as to the nature of the charges against him?
A. He asked me and I informed him.
Q. Did you and he have any discussion at all or talk about an attorney or lawyer on his behalf?
A. No, sir.
Q. Did he say anything to you about having a lawyer?
A. About getting one?
Q. Getting one or having one. What exactly did he say to you, if anything?
A. He made -- after he asked me what he was under arrest for, I informed him, and he made a statement about being a big shot in Lubbock and that he would see what his lawyer had to say about this.
Q. Did he ever ask you directly for a lawyer?
A. No, sir, he did not.
Q. Did you convey this information, what he volunteered to you, to any of the other police personnel (Pg. 154) once you got him to the City Jail?
A. Which information is that?
Q. His statement about a lawyer, about his lawyer in Lubbock?
A. I didn't feel like it was him asking for a lawyer, so I didn't pass on any information. I didn't feel like I had to."[3]

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[3] It was discovered after Officer Torbert's testimony that he had not been sworn as a witness. He was then sworn and asked if all of the statements he had previously given were true. He replied in the affirmative. (Pg. 156 Vol XVI, SF).

Officer Torbert likewise was permitted to characterize the conversation he had with Mayo about a lawyer as follows, (id, Pg. 157);

"Q. Did you take that to mean he was saying, "I'm not talking without a lawyer," or --
A. No, sir.
Q. How did you take that comment?
A. As a cocky reaction to an arrest."

Officer Torbert delivered Mayo to the jail where one of the jailers was Officer Frank Hinojos (Pg. 93-110, id). He was with the Police Department about a year from August 1983, until August 1984. He booked Mayo in jail at about 9:00 P.M. according to his recollection. He permitted Mayo to make two (2) telephone calls. As he remembered it Mayo completed one and the other did not go through. Mayo then asked to make a third call. Officer Hinojos, with regard to the third call, checked with Det. Billy Ward. Det. Ward told him they could wait awhile and let Mayo make a later telephone call. Officer Hinojos did the fingerprinting and after that had been completed he testified that Mayo said to him as follows, (id, Pg. 99);

"Q. It's your testimony as he was washing his hands he stated to you that he needed to talk to a detective to clear up the lake deal or about the lake deal?
A. He had said, "I need to talk to a detective about the lake deal, unquote.
Q. Did you have any other conversations with him regarding the lake deal?
A. None whatsoever."

Officer Hinojos then brought Det. Ward into the picture. He denied that there was ever any mention of a lawyer and he specifically denied that Mayo ever asked about a lawyer.

Officer Orlando Cortez was also on duty as a jailer (id, Pg. 211-215). He said that the local call which was completed was made to local telephone number in San Angelo 944-7940.

Mr. Jimmy Don Daniel testified that his telephone number was 944-7940 and that Mayo did call him the night of the arrest (id, Pg. 216-218). Mr. Daniel testified about the Mayo conversation as follows, (id, Pg. 218);

> "A. He said he was in jail and had been arrested on capital murder charges and would I please go get his car out of impound because he didn't want them to keep it.
> Q. Did he say anything to you about getting him a lawyer?
> A. No, sir."

Det. Billy Ward is the officer who took the two (2) written confessions and the oral confession. As a result of the latter the authorities recovered the alleged murder weapon. Det. Ward (Pg. 112-148) came to the jail and took Mayo to the Detective Offices. He testified that Mayo said he wanted to make a deal. The deal Mayo made was for the officers to let him see his stepsister, Lisa Swain, for about thirty (30) minutes without any bars between them, then he would tell them about the murder at the lake and lead them to the weapon. Mayo, interestingly enough, will not see her until after his first written and oral confessions. Det. Ward said he had no facts about the murder and just a

general knowledge of what he had heard around the Department when he came to work that evening. Ward asked Mayo where the gun was. Mayo then told him that there wasn't any gun that he had "beat her head in". The officer gave him his *Miranda* warnings prior to any of those statements and took one of the regular warning forms, typed in the date, name, etc. Det. Ward read the warnings to him, then he had Mayo read the warnings and initial them. The confession was then dictated by Mayo to Ward. Ward typed it. Mayo read it, made corrections and signed it. That confession was marked as State's Exhibit No. 7 and was introduced in evidence. Mayo was returned to his cell. Then when a group had been assembled to go to the lake to find the murder weapon Mayo was returned to the Detectives Offices at 11:56 P.M. He was again advised of his *Miranda* Rights and a card with Mayo's initials next to the printed *Miranda* Rights was produced, marked and admitted as State's Exhibit No. 8. They then went to the lake. Mayo first took them to one location, where the searchers were unable to find the murder weapon in the lake. Mayo then had them move down the shore a short distance to a second location. It was there in the lake that a bumper jack stand was found, which Mayo identified as the murder weapon.

After that Mayo was returned to the jail and Lisa Swain came with someone to visit with Mayo. Mayo and she were put in an office where no one could overhear them, but it had a glass door where they could be seen. Mayo talked for about thirty (30) minutes with Lisa Swain and then Detective Ward broke up the conversation.

Detective Ward felt that since they had the murder weapon it would be necessary to get still a second written statement. Mayo agreed to give it. Detective Ward gave him for the third time the

Miranda warnings, Mayo initialed them on the form in State's Exhibit No. 9. This constitutes the second written confession. Ward testified that it was during this second confession session that Mayo asked about the possible criminal charges. Detective Ward testified he made no promises or representation about what would happen or what the charges would be, etc.

Officer Bruce Grosshans (Pg. 202-210) was present during all three (3) of the confession sessions. He was present from the first confession through the warnings for the finding of the murder weapon and the final written confession. Officer Grosshans testified that Mayo at the initial meeting said he wanted to talk to the authorities about what happened that day at the lake. Officer Grosshans said then Detective Ward interrupted that conversation and read Mayo his rights. Grosshans stated this was when the first initialing of warnings took place. Officer Grosshans said that Detective Ward requested that Mayo read the form after it had been read to him and initial each one of them. Grosshans stated that Mayo looked at it, stated he knew what was in it, didn't need to read it and proceeded to put his initials on the form (id, Pg. 205). Officer Grosshans was also a witness to State's Exhibit No. 8 and 9.

That in summary represents the State's testimony with regard to the three (3) confessions. Mayo called three (3) witnesses in his own behalf besides Officer Torbert. Mayo called David Weathersbee, who was a relative of his (id, Pg. 159-171). He testified that he was with Mayo from about 1:45 P.M., to 7:00 P.M., and testified about their drinking beer. David Cassles another person testified that Mayo came to where he was working at a Home for Girls (id. Pg. 173-182). He claims that he told Mayo that Mayo couldn't stay because a friend of Cassles' had been killed at the lake

that day and he needed to see about it. Cassles admitted this was a lie. He only casually knew about her, but he just didn't want to be around Mayo.

Mayo testified in his own behalf at the *Jackson v. Denno* Hearing (id Pg. 183-202). Mayo testified that when he was riding to the jail with Officer Torbert he told Torbert he wanted to call a lawyer (id, Pg. 185). Mayo says that Torbert told him they would take care of that when he got down to the jail and that wasn't up to Torbert. When he got to the jail he asked to make a call. His first call was an attempt to call Mr. Sam Medina, an attorney in Lubbock. He agrees that there was no answer. It must be conceded it was late at night. Mayo said he next called David Weathersbee. He got an answer but Weathersbee was not at home (id, Pg. 194).

Mayo says that his first encounter with Ward was when Ward accused him of being a suspect in the lake murder. Mayo testified that they made a deal after Ward had gone and talked to the District Attorney. Mayo's general testimony was that he was asking for a lawyer and was denied the right to call an attorney. Mayo said he was told that if he would confess they would get him a lawyer and would make a deal that it would not be a capital murder charge. Mayo stated Ward left. Then when Ward came back he told Mayo the District Attorney agreed to his deal. After this Mayo says he confessed.

The Court simply announced at the end of the hearing that the Motion to Suppress was being overruled (id. Pg. 219-220). Then later as required by the Texas Statutes the Trial Judge entered what was labeled "Court's Findings in Absence of Jury on Voluntariness of Confession and Statements". After the *Jackson v. Denno* Hearing four (4) witnesses were

heard with regard to the confession before the jury. Detective Billy Ward testified (SF Vol. XVI Pg. 221-263 and Vol. XVII Pg. 363-371). Jimmy Don Daniel also testified (Vol. XVII SF PG 434-439). Mr. David Weathersbee again testified (SF Vol. XVII Pg. 440-450 and Vol XVIII Pg. 500-511). David Cassles also testified (Vol. XVIII Pg. 477-483 SF). The Jury was Charged with regard to the voluntariness of the confession and resolved that issue against the Petitioner.

It is so axiomatic to the law that authorities must comply with *Miranda v. Arizona*, 384 U.S. 436 (1966) that it does not need repeating. The contentions of the Petitioner here are intended to raise the specter and the shadow of *Edwards v. Arizona*, 451 U.S. 477 (1981). Edwards was a pre-indictment suspect, who while being interrogated, asserted his Fifth Amendment right to counsel. The U.S. Supreme Court specifically held that such a suspect may not be questioned again *unless* he *initiates* the interrogation. *Edwards* and its progeny seek to preserve the accused's choice to communicate with law enforcement authorities only through counsel. However, *Edwards* does not bar an accused from making a later election as to whether he will face the state officers during questioning with the aid of counsel or without the aid of counsel. When the accused, like Mayo, knowingly and intelligently pursues the latter course of doing it without counsel then there is no reason why his uncounseled statements should be excluded at the trial, *Edwards v. Arizona*, supra Pg. 485.

At its most recent term the United States Supreme Court has decided two (2) cases that are pertinent confession and right to counsel cases.

Patterson v. Illinois, ___ U.S. ___, 108 S. Ct. 2389, (1988) involves statements taken from an

individual indicted for murder. He was in police custody. He twice indicated his willingness to discuss the crime during interviews initiated by the authorities. *Patterson* made the argument that because his Sixth Amendment right to counsel arose in his indictment then the police thereafter were barred from initiating questioning. However, the Court takes note of the fact that he at no time sought to have counsel present. Likewise, the Court specifically pointed out that the Sixth Amendment right to counsel is not superior nor more difficult to waive than its Fifth Amendment counterpart.

The Supreme Court has held that the waiver of the Sixth Amendment right to counsel is valid only when it is reflected by an intentional relinquishment or abandonment of a known right, *Johnston v. Zerbst*, 304 U.S. 358, 464 (1938). The Court was simply saying that the accused must know what he is doing and make the choice with his eyes wide open, *Adams v. United States ex rel McCann*, 317 U.S. 269, 279 (1942). In cases arising under the Fifth Amendment the Court has held the only requirement is there be a full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it, *Moran v. Burbine*, 475 U.S. 412, 421 (1986). Thus, the waiver under either the Fifth or Sixth Amendment is that the accused be made sufficiently aware of his right to have counsel present during the questioning and of the possible consequences of his decision to forego the aid of that counsel.

The authorities may meet those burdens of waiver and a knowing decision with the *Miranda* warnings. First, the *Miranda* warnings give the Petitioner an awareness of his right to have counsel present during the questioning. If they tell the Petitioner that he has right to consult with an

attorney, to have that attorney present while he is being questioned and even to have a lawyer appointed for him if he could not afford to retain his own is all that is required, *Patterson v. Illinois*, id, Pgs. 2395-97.

Second, the *Miranda* warnings also serve to make a Petitioner aware of the consequences of a decision by him to waive his Fifth or Sixth Amendment right to questioning and to counsel. If he is admonished that any statement made could be used against him in a subsequent criminal proceeding, that of course being the ultimate adverse consequence the Petitioner could and may suffer by virtue of his choice to make uncounseled admissions to authorities, then the requirements of waiver are satisfied, *Patterson v. Illinois*, id, Pgs. 2395-7. This is not to say that the State must make sure that he has a full and complete appreciation of all of the consequences flowing from the waiver. The State need only show that the information provided to him satisfied the Constitutional minimum, *Patterson v. Illinois*, id, and *Oregon v. Elstead*, 470 U.S. 298, 316-317 (1985).

The second case is nearer to the at bar fact situation, *Arizona v. Roberson*, ___ U.S. ___, 108 S.Ct. 2093 (1988). Roberson was arrested at the scene of a just completed burglary. The arresting officer advised him of his Constitutional rights to remain silent and to have an attorney present during any interrogation. Roberson told the officer he wanted a lawyer before answering any questions. The officer duly recorded that fact in his written report. Three (3) days after arrest and while Roberson was still in custody, a different officer interrogated him about a different burglary. That officer testified he was unaware that the defendant had requested the assistance of counsel three (3) days earlier. The officer advised Roberson of his rights and obtained an incriminating statement.

The prosecution sought to bring Roberson within the ambit of *Michigan v. Mosley*, 423 U.S. 96 (1975). *Mosley* had told the officers that he didn't want to proceed any further with the interrogation. The Court said the officer could resume questioning only after a passage of significant period of time and the provision of a fresh set of *Miranda* warnings. The Court restricted the second interrogation to a crime that had not been the subject of the earlier interrogation. In *Michigan v. Mosley*, supra, the police followed exactly that course. However, the Supreme Court made clear there is a distinct difference between Mosely's decision to cut off questioning as opposed to a request for counsel. His desire to cut off questioning did not raise the presumption that he was unable to proceed without a lawyer's advice.

The Trial Court on the 24th day of January, 1985, memoralized and entered of record its findings with regard to the *Jackson v. Denno* hearing (Transcript, Vol. I, Pg. 178-179).

The Respondent has pled the doctrine of Presumption of Correctness of State Court Findings. There is definitely the doctrine that findings of the State Trial or Appellate Courts with regard to factual issues are subject to being presumed to be correct, 18 U.S.C. 2254 (d), *Sumner v. Mata*, 449 U.S. 539 (1980) and *Wainwright v. Witt*, 499 U.S. 412 (1985).

In the case at bar the Appellate Court made no Findings of Fact with regard to the voluntariness of the confession, however, as previously pointed out the Trial Court did. It is definitely established that the facts with regard to what went on during the interrogation, the length of it, the giving of the warnings, the promises of leniency, etc., are subject to the "Presumption of Correctness", both in case and

statutory law. However, it is further clear that even granting that presumption of correctness then the determination as to whether the confession(s) was obtained in a manner consistent with the Constitution is not a matter subject to a presumption of correctness and the Federal Court is in an equal position with the State Court to make that determination, *Miller v. Fenton*, 474 U.S. 104, 117 (1985). The Trial Judge found facts regarding the interview leading up to the confessions and decided the interviews "were not initiated by any law enforcement officer, but by the defendant." Thus, *Edwards v. Arizona*, specifically applies. *Edwards* held there that even though the defendant may have insisted upon his right to counsel, if he INITIATES a NEW conversation there is no problem with the Fifth or Sixth Amendment.

The second contention by Mayo is that he was promised leniency or that he would not be charged with capital murder. The Trial Court found that Mayo's testimony was not credible. The Trial Court based that upon fact that Mayo had testified falsely as to other matters specifically with regard to his conversation with Jimmy Don Daniel subsequent to his arrest and prior to his making any statement. However, the Trial Court did not make a Finding of Fact specifically based upon Officer Ward or Officer Grosshans testimony that no promises of leniency were made. The Trial Court found,

> "This is denied by all of the other witnesses [,] who would have had an opportunity to be present,..."

The conclusion is inevitable that if there is no testimony in the record that is credible that leniency was promised, then it is rather immaterial what the

officers may have denied since there is nothing believable to deny.

In effect the two (2) factual issues raised were decided by the Trial Court when it made credibility choices and found that the conversations leading up to the confessions were initiated by Mayo and no evidence of leniency promises. The Trial Court made no finding as to whether the Petitioner demanded a lawyer or didn't demand a lawyer in the trip to the jail with Officer Torbert. However, since the Trial Court in line with *Edwards v. Arizona*, supra, found that the new conversations were initiated solely and exclusively by Mayo, such demand if made would no longer restrict custodial questioning. The Trial Court's finding with regard to those facts being entitled to a presumption of correctness are; first, that Mayo initiated the conversations preceding the confession; and second, that his testimony with regard to promises of leniency were not credible. The Court found that Mayo "was given Miranda warnings on three different occasion,...". The Trial Judge also found that Mayo was informed of his right to an attorney and "expressly waived" that right. In conclusory fashion the Court found the confession was voluntary. Such findings are entitled to a presumption of correctness. Mayo has pled nothing to set aside a presumption of correctness finding under 28 U.S.C. 2254 (d) (1 through 8 inclusive). Therefore, this point of error being subject to a presumption of correctness should be DENIED.

GROUND OF ERROR NUMBER FOUR

The trial court committed fundamental error by failing to swear the jury collectively prior to the commencement of the evidence or at any time during the "trial". Said failure violated Article 35.22 of V.A.C.C.P. and additionally denied

> Petitioner his right to a trial by jury as guaranteed under the United States Constitution and the Texas Constitution. Such failure to swear jury constituted fundamental error.

Mayo's complaint under this ground of error is that the jury was not administered its oath in accordance with Article 35.22, Code of Criminal Procedure of Texas. It is evident from the reading of the Statute and the State cases as cited by Mayo that in Texas all of the selected jurors in a capital murder trial must be collectively given an oath. For whatever reason the Trial Judge decided to administer the oath to each juror as selected. A Supplemental Statement of Facts in three (3) parts has been filed with the Court by three (3) different court reporters showing the Juror oath was administered to each juror individually and not collectively.

As pointed out by the Respondent, there are no pleadings in this case that the giving of individual oaths as opposed to a collective oath somehow infringed Mayo's right to a fair trial by a jury as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Further, Mayo has not pointed out how such Juror oath procedure prejudiced him or affected the outcome and validity of the verdict in this case. He has not alleged that the Jurors violated their oath, he has simply objected that the oath was given to them individually rather than collectively. The Supreme Court said in *United States v. Powell*, 469 U.S. 57, 66 (1984),

> "Jurors, of course, take an oath to follow the law as charged, and they are expected to follow it. See *Adams v. Texas*, 448 U.S. 38 (1980)."

This ground would appear to be frivolous. It is based upon a technical violation of Texas procedure. It is not in the nature of a Constitutional violation.

Even if it is assumed, arguendo, that this ground rises to the level of a Constitutional violation, it is beyond a reasonable doubt a harmless error, *Chapman v. California*, 386 U.S. 18, 22 (1967), *Rose v. Clark*, 478 U.S. 570, (1986) and *Richardson v. Lucas*, 741 F.2d 753, 755 (5th Cir. 1984).

GROUND OF ERROR NUMBER FIVE

> The Trial Court committed fundamental error by failing to qualify the prospective jurors by either swearing them in accordance with the oath prescribed in Sec. 12.31 of the Texas Penal Code or in the alternative, by failing to ask them while under oath the question required in Sec. 12.31 of the Texas Penal Code.

Section 12,31 (b), Texas Penal Code, read as follows, to-wit:

> "Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact."

Of all the issues raised this one is not only frivolous but could be a claim on behalf of the

prosecution. When a juror is instructed that on conviction for a capital felony there would be either the mandatory penalty of death or imprisonment for life and is asked if that would affect his deliberation on any issue of fact, constitutes a question to be more appropriately asked by the prosecutor. If the juror answers "yes", then he is indicating that because of the gravity of the potential punishments he would be affected, tending to leniency.

If a juror answered that yes he would be affected in his deliberations on an issue of fact, who would challenge him for cause? The State would not want such a juror. A Defendant would desire such a juror.

This concept of this specific section of the Texas Penal Code was addressed by the United States Supreme Court in *Adams v. Texas*, 448 U.S. 38, 48-49 (1980), which said;

> "Finally, we cannot agree that Section 12.31 (b) is a 'neutral' with respect to the death penalty since under that Section the Defendant may challenge jurors who state that their views in favor of the death penalty will affect their deliberations on fact issues. Despite the hypothetical existence of the juror who believes literally in the Biblical admonition 'an eye for an eye,'... it is undeniable, and the State does not seriously dispute, that such jurors will be few indeed as compared with those excluded because of scrupples against capital punishment."

Thus, it is plain that this Section of the law is of benefit to the State and not to a Defendant.

This whole process of selecting jurors has gone through careful consideration by the Supreme Court. In the recent case of *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) the Court stated,

> "That standard is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'"

There is a wide gulf between determining that a juror's views would substantially impair his performance as a juror and in determining that the mandatory penalty of death or life imprisonment will affect his deliberations "on any issue of fact."

Mayo seeks to assert that a question which would be useful to the State in deciding what veniremen to exclude was not asked, thereby he was harmed. If the question was not asked, then in the course of these proceedings there may have been jurors who were put on the jury that were objectionable under this standard to the State.

Adams v. Texas, makes it plain that if this Statute is used to exclude veniremen it will not meet the *Witherspoon* standards. *Adams*, thus stands for the proposition that this Statute denies a defendant, like Mayo, the opportunity to have a cross section jury of the community.

The very case cited by Mayo makes the point set out herein, *Loudres v. State*, 614 S.W.2d 407 (Ct. Cr. App. en banc 1980) reh. den. 1981. The complaint in that case was being made by the condemned defendant. He said that 12.31(b), supra, had been used in his trial by the prosecution to exclude jurors, thus denying him

a fair trial. The Texas Court of Criminal Appeals agreed with him in light of *Adams v. Texas*, supra, and reversed his judgment of conviction. If 12.31 (b) *had* been used to exclude jurors Mayo would have a complaint. It was according to Mayo not used to exclude jurors. He has no complaint.

Texas law is that the failure to administer this 12.31 (b) as a separate oath would not render veniremen disqualified, it is simply a criterion of qualification, *White v. State*, 629 S.W.2d 701, 704 (Ct. Cr. App., en banc 1981) reh. den. 1981, cert. den. 102 S.Ct. 1995 (1982).

Therefore, there is no error shown by this alleged claim on the part of Mayo. The failure to ask the question caused him no harm.[4]

GROUNDS OF ERROR NUMBER SIX, SEVEN AND EIGHT

> That the trial court committed error in allowing Juror Coleman to be dismissed from jury service. Said dismissal was error even though all parties consented because Juror Coleman, after having been duly sworn was not disqualified from service under any of the required disqualifications for service.
>
> The trial court erred in not excusing for cause Juror Gus Edwin Young.

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[4] In addition, Mayo did not point out a specific juror(s) who was not asked this question and was placed on the jury causing him not to have a fair trial.

That the trial court erred in not excusing for cause Juror Harvey Leon Reeves.

These three (3) grounds are grouped together because they all involve the complaint about jurors.

Mayo complains that Juror Harvey Reeves and Juror Gus Edwin Young were both improperly impaneled on the jury. After Juror Reeves had been questioned on voir dire by both the State and Mayo the Petitioner objected to the acceptance of the juror for cause (Vol. VII, Voir Dire, SF, Pg. 923). The Court after further examination by the State of the veniremen then overruled the challenge to such veniremen (id, Pg. 925). Then it came down to a question of would the State accept the juror and the State indicated to the Court that the juror was acceptable to them (id, Pg. 927). At that point the Petitioner's attorney asked for a moment to consult. The record does not say who was consulted, but some off the record discussion was held. Then the attorney for Mayo announced, "The defense will accept this juror, Your Honor." (id, Pg. 927).

The next juror about which complaint was made was gus Edwin Young. Mayo objected to the juror without stating the actual basis for the objection (Vol. IX, Voir Dire Statement of Facts, Pg. 1235-4). No ruling was ever made on that objection, nor was a ruling ever demanded. After further questioning of the juror the State announced that they would accept the juror (id, Pg. 1245). Then one defense lawyer announced that they would accept the juror. The Judge asked if the defense accepted the juror. The other defense lawyer answered in the affirmative.

The third juror complained about is one that was excused by the Court after having been selected and sworn. A lady venireperson named Audrey Coleman

was accepted as a juror and sworn in. After her selection it is obvious that the Court had received some kind of notification that Ms. Coleman's child had contracted the chicken pox. Ms. Coleman had further reported to the Court that she had never had the chicken pox. The Court was concerned about the possibility that she would be infected, become sick and perhaps other jurors would catch the chicken pox. Since Ms. Coleman did not have a telephone the Judge determined to send the Sheriff out to make inquiry about the chicken pox situation (Vol. IX, Voir Dire Statement of Facts, Pg. 1152-1155).

The chicken pox discussion will come up again and the Judge will excuse Ms. Coleman from the jury. However, it is interesting to note that just before that discussion it was announced in Court that Mayo has used up all of his peremptory challenges. The Court had just awarded him three (3) additional peremptory challenges (Vol. X, Voir Dire Statement of Facts, Pg. 1396). Following the awarding of the three (3) additional peremptory challenges a discussion was held with regard to Ms. Coleman. The Judge spoke with the lawyers and they all seemed to be agreeable to excusing her. However, the Judge wanted to be sure that Mayo understood what was going on and addressed him directly. The Judge explained the situation about the chicken pox, the incubation period, they would let her go and then have to pick someone to take her place on the jury (id, Pg. 397-398). The Court first asked him if he understood about all of that and did he have any questions. Mayo indicated he had no questions. The Court then explained that she would be excused. Mayo indicated that he understood. The Court specifically asked him if Coleman's being excused met with his approval. Mayo answered in the affirmative. Then Mayo's lawyers raised the issue that since they had found her acceptable, and she was now being

excused that were concerned they wouldn't find another juror down the line as acceptable to the defense as Ms. Coleman. The Court decided to award, as a result of the Coleman excusal, an additional cut. Thus, in addition to the three (3) new challenges another was added. Mayo was given a fourth peremptory challenge with regard to jury selection.

The grounds with regard to the Venireman Reeves, Juror Coleman and Venireman Young do not rise to the level of a Constitutional violation. It is evident that a discussion off the record took place amongst the lawyers and presumably Mayo, for purposes of Venireman Reeves. No ruling was ever obtained upon the objection of Venireman Young before he became a juror. On both Young and Reeves it was announced that they were acceptable to Mayo.

Finally, not only did the lawyers for Mayo agree to the excusal of Ms. Coleman, but Mayo in person agreed that she could be excused. As a result of her excusal Mayo was given an additional peremptory challenge. Nothing in this entire procedure rises to the level of a Constitutional violation. Mayo seeks to complain about that to which he had agreed in all three (3) instances.

ALL OF THE REMAINING GROUNDS ARE FOR INEFFECTIVE ASSISTANCE OF COUNSEL

There are certain general characteristics common to Grounds 9, 10, 11 and 12, having to do with ineffective assistance of counsel. The controlling authority on counsel's effectiveness, is *Strickland v. Washington*, 466 U.S. 668 (1983). The entire area of effective assistance of counsel is under the Sixth Amendment right to counsel. The Court said, id., pg. 685,

> "Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled."
>
> The test itself is embodied at id, pg. 687,
>
> "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made error so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a break down in the adversary process that renders the result unreliable."

It is not necessary to initially make the decision about whether counsel's conduct meets the first prong of the test. The Supreme Court has permitted lower Courts to

examine first the prejudice question and determine if, arguendo, counsel made errors resulting in an unreliable result, id., pg. 697.

GROUND OF ERROR NUMBER NINE

> Petitioner was denied a fair trial in that his trial counsel acted incompetently by failing to exercise peremptory challenges on Juror Gus Edwin Young and Juror Harvey Leon Reeves.

As has already been discussed herein, both juror Young and Reeves were accepted by the defendant. In fact counsel made an objection to them for cause and in one instance the objection was overruled. No ruling was made with regard to the other juror, however, none was eventually necessary since by agreement the juror was taken on the jury. It could not thus be error for counsel to fail to get a juror excused for cause. Such a ground at best would be a trial court error. Since counsel made the challenge for cause that is all that is possible. However, on both venireman each was later accepted by the defense.

At the second Evidentiary Hearing Attorney Hawkins was questioned about Reeves and Young. Hawkins said initially both veniremen had a misunderstanding about imposing the death penalty. When their misconception was cleared up, Hawkins said,

> ". . . apparently we wanted them as jurors, or we wouldn't have gone ahead and accepted them, we would have used our pre-emptory (sic) challenge."

This was a clear statement of trial strategy. Mayo has offered no evidence to counter this strategy as being erroneously and unprofessionally calculated.

GROUND OF ERROR NUMBER TEN

> Petitioner was deprived his right of his constitutionally guaranteed right to effective assistance of counsel as guaranteed by the United States Constitution Amendments 6, 8 and 14. Said denial of effective assistance consisted of failure of his court appointed attorneys to raise the issue of the legality of the confession in his Appeal to the Court of Criminal Appeals of Texas.

No prejudice can be shown from this ground as is already demonstrated by the discussion herein on claimed grounds of errors number 2 or 3. The confessions were found voluntary by the Trial Judge. The Court of Criminal Appeals would have followed the same analysis as this Court. Therefore, the previous discussion under grounds 2 and 3 herein with regard to the voluntariness of the confessions would apply to this ineffective assistance of counsel claim. There is no possible harm or prejudice in the failure to appeal that which would have been affirmed.

GROUND OF ERROR NUMBER ELEVEN

> Petitioner Mayo was denied effective assistance of counsel in that counsel failed to adequately or fully develop testimony upon cross-examination of the following witnesses:

> Billy Ward, LeeAnn Coulter, Sam Halstead, Cindy Porter, Teresa (Neyra) Hilderbrand, Raymond Naron, Don Ward and Michael Valles. Said failure by appointed counsel to adequately cross-examine or in the alternative to present additional evidence to counter testimony by the above witnesses denied Petitioner of his right to a fair trial.[5]

It is noted that the pleadings only raise an issue about the examination of Billy Ward, LeeAnn Coulter, Sam Halstead, Cindy Porter, Teresa (Neyra) Hilderbrand, Raymond Naron, Don Ward and Michael Valles.

At the first Evidentiary Hearing Mayo testified about several other matters concerning presentation of evidence or the claimed inadequate cross-examination of certain witnesses by his trial counsel. An Amended Pleading was filed after the first Hearing. These unpled claims were not raised in the new pleadings.[6]

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[5] In the previously mentioned Order of May 14, 1987 for Amended Pleadings, Mayo was ordered to plead more specifically regarding the testimony of these eight (8) witnesses. Such Order has never been compiled with. Thus, in discussing the specific claims of error with regard to these witnesses it is necessary to refer to Mayo's testimony at the Evidentiary Hearing because Mayo did not supply this Court with specific pleadings as ordered.

[6] There are three (3) incidents that were testified by Mayo at the Evidentiary Hearing that have not been pled. Mayo testified that he wanted his lawyers to cross examine the two (2) jailers about keeping records of the telephone calls. It was Mayo's position that one (1) of the jailers said there were no records and the second was able to give the telephone number from records. He alleged this contradiction was not exploited. Likewise, Mayo said that they had the telephone number of the person he called in San Angelo, but not the telephone number of the the place he

(footnote continued on next page)

Nor did Mayo request permission to include them in his second but unfilled [sic] Amended Petition. Therefore, only the eight (8) witnesses raised by the pleadings will be discussed.

A. WITNESS, BILLY WARD

Billy Ward is the San Angelo police officer who was the State's main witness with regard to the three (3) confessions given by and taken from Mayo. The issues raised by Mayo's testimony at the Evidentiary Hearing as to Ward's testimony are as follows;

1. State's Exhibit #5, is a picture of the crime scene which shows the victim's vehicle. It is shown to be a four (4) door Chevrolet, while the confession describes it as a two (2) door Chevrolet.

2. In the first confession the general term "knife" is used. In the second written confession it is described as a "white handled pocket knife".

(footnote continued from previous page)
attempted to call in Lubbock. He alleges the latter number would have corrorborated his story about trying to call a lawyer. Mayo also testified that Sgt. Garza, who was at the situs of his arrest, testified that he had Mirandized him there. Mayo says that he was not Mirandized and his lawyers didn't cross examine Garza about that matter. However, these three (3) incidents were not pled as matters to be considered by the Court.

Even if he called an unanswered lawyer's number the fact finding is that *Mayo initiated* the conversation about the lake murder. This Mayo initiated conversation was after his lawyer call. It is absolutely frivolous whether Sgt. Garza Mirandized Mayo. He was found to have voluntarily confessed based on Detective Ward's three (3) *Miranda* warnings.

3. In the first confession it says that the victim was wearing a one-piece bathing suit. In the second confession there is no mention of a bathing suit, nor does the second describe the fact that the victim got up and put on a tee shirt and a pair of jogging pants as was described in the first confession.

4. No effective cross examination about the alleged promise of leniency.

The discrepancies in the confession are those as made by the Defendant himself. For example, it was he, based upon the present state of the record, who said that the automobile was a two (2) door Chevy, when in fact it turned out to be a four (4) door Chevy. Whether the knife was described in the first confession or not, would also be immaterial. It was Mayo who gave the confession and according to Ward he took it down exactly as Mayo dictated it.

There really is no inconsistency in simply calling it a knife in the first confession, then giving it a description as a white handled pocket knife in the second.

The bathing suit matter is like the others. It is minor and offers no real opening to effectively cross examine. It is to be kept in mind that the two (2) written confessions are in Mayo's words.

The promises of leniency were fully explored at the Motion to Suppress, at the Examining Trial and during the trial before the jury. The *only person* who testified about promises of leniency was Mayo at the Motion to Suppress. An adequate job was done by his attorneys in presenting Mayo's contentions in that regard. Therefore, there is no error of Constitutional

dimensions that would change the outcome of the trial on these three (3) minor points. On the other side of the coin, there is no ineffective assistance of counsel.

B. WITNESS, LEEANN COULTER

1. The claim is that a missing person report was filed on Coulter by her mother who had reported that Coulter overdosed on a previous occasion. The mother was afraid she had overdosed this time. While defense counsel did inquire of LeeAnn if there was a missing persons report on February 16, 1984, the claim is they did not attempt to elaborate on the contents of the report to impeach her testimony.

2. During his testimony at the Evidentiary Hearing, Mayo spoke about the stolen reports on his vehicle and frankly his testimony in such respect is rambling. It is impossible to tell from the Evidentiary Hearing exactly what he is getting after. The pleadings are no help in this regard either. Mayo did offer a list of witnesses he said could have contradicted some of this testimony. Those witnesses were Elida Casteaja, Anita Mendoza, Yolanda Valdivia, J.C. Harold (who was called as a witness but not cross examined about these matters), David Mendoza, Jimmy Casteaja, Tim Seals and Russell Taylor.

LeeAnn Coulter testified that in February and March of 1984, in Lubbock, she lived with Mayo although she was still married to another man. She stopped living with him and in April she was living with two (2) brothers, Jack and Benny Armstrong. On the night of April 9, 1984, Mayo came to their trailer house and tried to break-in. He and Jack Armstrong had a confrontation. Jack Armstrong evidently had a knife and Mayo had a gun. However, Mayo only wanted to talk to LeeAnn Coulter. That conversation took place and Mayo put down his gun. She said that he had previously loaned her a car to drive and she returned to Mayo the keys to his car.

She went out for an evening on April 10th with Harry Richards, who was not her husband. Mayo confronted her late that evening and told her he would kill Harry Richards. Then on the evening of April 11th she saw Mayo twice and he was still in an angry humor. She testified that in her opinion Mayo would commit future criminal acts.

Yolanda Valdivia also testified. She said that during the early morning hours of April 12, 1984, Randy Mayo came to her house, attempted to come in the door and then climbed in the window. She said his hands were covered with blood and cut and he was shaking bad. He told her that "they" had just finished killing somebody named "Harry." He told her how they lured him out and he even offered her money to not tell anyone about the matter. He told her he had lost his belt buckle at the scene and he needed to go back and look for it. The State proved through other witnesses that the person murdered was Harry Richards. Richards death is the capital murder charge from Lubbock.

Coulter testified to the incident with the gun, but so did several other witnesses. Even Mayo's witnesses said he had a gun. Whether she had ever overdosed on drugs or whether there was a missing person report seems immaterial to the heart of the issue. Mayo carried a gun, confronted a man with the gun, came looking for her and even confessed to a murder through another witness. He apparently murdered LeeAnn's date. There is no ineffective assistance of counsel in failing to go over the missing persons report. Further, although attorney Hawkins testified he simply didn't ask about the return of the vehicle and summon all of the witnesses who could have shown that she kept the vehicle over Mayo's wishes, is just a minor point. As already pointed out, the heart and soul of the testimony from Coulter had to do with Mayo's actions after Coulter quit living with him. LeAnn's accounts were amply supported by other witnesses.

C. WITNESS, SAM HALSTEAD

1. In a rambling fashion again Mayo testified about matters involving Mr. Halstead with the idea that the cross examination should have been about Mr. Halstead calling Mayo and his business partner out on a false wrecker service call in Lubbock.

Sam Halstead testified that the evening of April 9th when Randy went to the trailer where LeeAnn was staying with the Armstrongs', he went with him. Mayo was wearing a pistol and had recruited Halstead to help him recover his vehicle from LeeAnn. Halstead testified that about five (5) of them went, they banged on the door, Armstrong came to the door and was

holding a knife. After he had seen the knife Randy pulled his gun out.

Cross examination on a minor matter which would have little affect on the credibility of the witness whose story was in its general contours and outlines corroborated by several other witnesses is of no significance in the final outcome.

It is difficult to understand what harm resulted from the failure to cross examine. Mayo simply rambled about people coming to his place, making a false service call, etc. Even assuming, arguendo, that Halstead had instituted some kind of a false service call, his other testimony was corroborated by many other witnesses.

D. WITNESSES, CINDY PORTER AND TERESA (NEYRA) HILDERBRAND

1. Porter testified that just before she and Hilderbrand were kidnapped in Greenville, Texas by Mayo that he gave a little satanic or devil laugh. Mayo contends this was not her testimony in the original trial in Greenville. That it was never used in the cross examination of Porter and Hilderbrand as to why they said that now and hadn't said it before.

The witnesses Porter and Hilderbrand testified about a kidnapping incident in Greenville, Texas, on August 31, 1979. Cindy Porter and her friend, Teresa Neyra Hilderbrand were in the Porter vehicle at a car wash in Greenville, Texas. Mayo, a stranger to them, came up to the car wash with a knife, kidnapped the

two (2) girls and was making them drive him allegedly to Sulphur Springs. They were able to get him to stop to get gas. Porter got notice to the station attendants, the police came and they escaped.

The complaint here is that Porter gave some testimony about a laugh by Mayo at the time of the incident. He says she should have been cross examined because it wasn't in her statement nor at her testimony at the trial.

The testimony about the laugh appears at Page 831 of Volume XX of the Statement of Facts. Interestingly, that testimony by Porter was out of the presence of the jury. Mayo had said he wanted a phone and she had told him there was a pay phone at "Woody's". She said that after she told him it was at Woody's he gave a ". . . crazy laugh. You can't imagine what it sounded like." It was this she said which prompted she and her friend to get in the car and attempt to escape, which they were not able to do. In cross examination with the jury in the box (Page 854) counsel for Mayo did ask her if it wasn't true that she had not mentioned anything about a crazy laugh or a crazy behavior on the part of Mayo in her original statement. She agreed she had not put it in her statement.

No one ever used the term satanic laugh as described by Mayo. She called it a "crazy laugh". As already pointed out, the testimony relative to the laugh was given by Cindy Porter out of the presence of the jury. Then at Page 854, Volume XX of the Statement of Facts on cross examination, Mayo's lawyer brought up the subject of the laugh. The lawyer got her admission that it was not included in her previous affidavit about this incident and that she had told about it on the stand in this trial for the first time. That is precisely the cross examination he wanted. Therefore, the

factual complaint here is invalid since Mayo had the cross examination he wanted.

E. WITNESS, RAYMOND NARON

1. Naron is the Chief of Police at Abernathy, Texas. Mayo wanted a long list of witnesses to show that Mr. Naron did not like Mayo, had harassed him and all of his friends. Mayo at the Evidentiary Hearing gave a long list of witnesses, including his relatives, who could have testified to the bad blood between them. He complained no cross examination was made of the many times that Naron had attempted to harass him.

The thrust of Naron's testimony was that Mayo would commit future criminal acts and that he was a danger to society. He was asked if he had ever seen Mr. Mayo assault anyone and his response was only verbally.

Hawkins testified that this witness was one he wanted on the stand and off. Hawkins felt that he potentially could do great damage if he stayed on the stand. Hawkins had talked to him before his testimony. Hawkins did ask the question if there wasn't some animosity by Naron against Mayo and his family. While admittedly Naron said no, at least the question was asked which gave a message to the jury that there may be more to this witness than meets the eye. The failure to call witnesses to tell all of the stories about Naron with the potential of anything else that they might tell was overcome by the trial strategy. Thus, there was no ineffective assistance of counsel

concerning a lengthy cross examination of Naron. Counsel's trial strategy was valid.

F. WITNESS, DON WARD

1. Ward is a deputy from Greenville, Hunt County, Texas. During Ward's trial testimony he was discussing a night that Mayo spent in jail in Greenville, Texas. Ward denied that Mayo had been cut or stabbed while in the jail. Marked as Petitioner's Exhibit 1 was an Affidavit from July 23, 1980, by Don Ward, in which he related an incident in the jail involving a knife. Apparently from the tenor of the Affidavit in a shoving match with Mayo, Ward acci-dently cut Mayo's hand. Mayo says the Affidavit of Ward should have been introduced into evidence. The Affidavit was marked here as Petitioner's Exhibit 1 and is attached to the Evidentiary Hearing in this case.[7]

Ward was deputy sheriff in Hunt County and during a shake down of the jail he and Mayo, who was a prisoner, had a scuffle. Ward testified that in the incident Mayo was cut. His response was that he did

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[7] There was an objection by the Respondent to the admission of this Affidavit. The end discussion at the Evidentiary Hearing was that the District Attorney from Tom Green County, Texas, was to check his files and see if the Affidavit was part of the original capital murder trial and part of that which was provided as discovery to Mayo. This was never done nor has the Petitioner ever insisted that such search be completed.

not cut Mayo, but that Mayo was cut in the scuffle. He was asked if he was holding the knife and he said no, they were scuffling over the knife. He admitted that Mayo had been cut.

Ward conceded that in the scuffle which took place in the Greenville Jail, Mayo had been cut. Ward denied that he intentionally cut him. The knife was being carried by Ward.

Hawkins testified that he felt he could get more mileage out of the fact that there was an affidavit in which Ward had talked about the incident and the cut on Mayo's hand at the jail in Greenville, than to introduce the affidavit. Hawkins said the affidavit shouldn't have been introduced because it had other damaging facts about Mayo. It certainly does. Thus, the trial strategy with regard to the witness was clear and valid.

G. WITNESS, MICHAEL VALLES

1. Valles had testified that he was a prisoner while in Tom Green County Jail with Mayo. He was with Mayo after Mayo's arrest for this offense. Valles claims he was brutally beaten by Mayo and continuously harassed by him. Mayo's claim here is that Valles could have been further impeached because a jailer named Randy Richards and two (2) inmates named Clifford Mauler and Wayne Cargile were not called as witnesses.

Valles was an inmate at the Tom Green County Jail when Randy Mayo was there. Valles testified to the violence and threats that Mayo directed toward

him as a fellow prisoner. Part of the violence involved actual physical attacks. In the cross examination of Valles it was ably demonstrated by counsel that Valles had probably made a deal to get his own Application to Revoke his Felony Probation dismissed for his testimony in the Mayo trial.

Clifford Dennis testified about the assault incidents involving Michael Valles. Dennis said that Valles would not shower, hadn't done so for a week and that his unsanitary habits were the cause and result of the incident. Dennis testified that Valles and Mayo had an argument and Mayo backhanded him, but with no excessive force. This according to Dennis was the extent of the entire fight.

Effective cross examination of Valles showed the jury that Valles was receiving some kind of consideration on his own criminal punishment for testifying in the Mayo trial. Further, the point was made to the jury through Dennis that the problem with Valles was that he would not co-operate in the sanitation procedures in the jail and Mayo had slapped him. Valles described it as more than that. At least it also established the basis for the jury to infer that Valles had a reason to get even with Mayo. There was no ineffective assistance of counsel in cross examining the witness, Valles, or in failing to provide the other witnesses, who according to Mayo had overheard Valles bragging that he was to get leniency for testifying.

With regard to witnesses who did not testify at the trial, it is the duty of Mayo to bring the missing witnesses to the Federal Evidentiary Hearing so this Court can hear what they would have said. To simply have listed a witness(es), for example, under the Coulter affair about the return of the vehicle or here under the Valles matter concerning conversations that

took place at the jail, is not sufficient, *McFadden v. Cabana*, 851 F.2d 784, (5th Cir. 1988). In *McFadden*, id., pg. 786, the Court said,

> "McFadden was the only witness at the evidentiary hearing. He testified he had been visiting his sister in Ohio at the time of the robbery and had spent most of his time there with three men who, he claimed, could corroborate his story. However, neither these men nor McFadden's sister nor his trial counsel appeared at the hearing, and McFadden filed no affidavits or other evidentiary material to support his account. . . . (Pg. 787). To obtain relief on this claim that he should have received an opportunity to investigate and present alibi witnesses, therefore, McFadden must show a reasonable probability that those witnesses would have come forward and *presented testimony that would have altered the verdict*." (Emphasis Added)

Mayo has with regard to all of these missing witnesses offered no testimony from these witnesses at either of the Evidentiary Hearings. Mayo has offered nothing more than his own testimony as to what their testimony would have been. The legal burden that it would have altered the verdict has, because of the failure to produce, not been met, *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985) and *Gilliard v. Scroggy*, 847 F.2d 1141, 1146 (5th Cir. 1988), reh. den.

GROUND OF ERROR NUMBER TWELVE

> Petitioner Mayo was denied effective assistance of counsel when his counsel failed to call Assistant District Attorney Tom

> McCoppin as a witness with regards to whether or not a "deal" was discussed in exchange for Petitioner's confession.

It is not sufficient for Mayo to simply allege that if McCoppin had been called as a witness at his trial he would have testified that a deal for leniency was made in exchange for the Petitioner's confessions. The burden of proof is on Mayo in this collateral proceeding. It is essential that Mayo not only plead that McCoppin would have so testified had he been called, but he must present that testimony in the evidentiary hearings before this Court to satisfy the necessity of showing the error, *Alexander v. McCotter*, supra, and *Gilliard v. Scroggy*, supra. In *McCoy v. Cabana*, 794 F.2d 177, 183 (5th Cir. 1986), our Circuit Court said,

> "'[C]omplaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy, and because allegations of what a witness would have testified are largely speculative.' *United States v. Cockrell*, 720 F.2d 1423, 1427 (5th Cir. 1983) cert. den. 467 U.S. 1251 (1984) quoting *Buckelew v. United States*, 575 F.2d 515, 521 (5th Cir. 1978)."

As was pointed out in *McCoy*, id, not only is the content of the alleged testimony unknown, but it is impossible to determine how such testimony would have helped Mayo if the Court does not hear the precise evidence. Therefore, no error is presented to be considered here in a factual context. As was said in *Byrne v. Butler*, 845 F.2d 501, 512 (5th Cir. 1988),

> "If the petitioner's allegations cannot be resolved absent examination beyond a

> record, a hearing is required, . . .; if the record is clearly adequate to fairly dispose of the claims . . . further inquiry is unnecessary."

Mayo was twice offered an opportunity to present the evidence to this Court. He presented no evidence that Tom McCoppin as a witness would have testified that a deal for leniency was made to induce Mayo to give the confessions. Therefore, no prejudice is shown. It is impossible, therefore, to determine if counsel was ineffective for failing to call McCoppin since there was nothing for this Court to consider that might have been presented to the Trial Court. Detective Ward testified that no leniency was promised to induce the confessions.

In *Strickland v. Washington*, supra, Page 689, the Supreme Court required that judicial scrutiny of trial counsel's performance to be highly deferential. No second guessing is to be done, every effort is to be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances at the moment they occurred, and to evaluate counsel's conduct then and not from the prospective of a later date.

The Supreme Court requires that a "strong presumption" be indulged that counsel's conduct falls within the wide range of reasonable professional assistance. Mayo must overcome the presumption that, under the circumstances that existed at that moment, the challenged action should be considered sound trial strategy. The Court specifically admonished with regard to those professional judgments, that it is to be recognized that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment, id., Page 690. Strategic choices or trial strategy are the questions that must be determined.

The presumption as can been [sic] seen from *Strickland v. Washington*, id, is that counsel has acted professionally. Mayo has failed to overcome that presumption in any particular. In addition he has not met the prejudice prong either.

I, therefore, recommend that this Petition for Writ of Habeas Corpus be DENIED and DISMISSED.

The Clerk is directed to file this Report and Recommendation and to send a copy of it to Petitioner and a copy to each attorney of record. Any party may object to the proposed findings and to the recommendation within ten (10) days after having been served with a copy hereof, Rule 8 (b)(3), Rules Governing Section 2254 cases, Rule 72, Federal Rules of Civil Procedure, and Rule 4 (a) (1) of Miscellaneous Order No. 6 as authorized by Local Rule 3.1, Local Rules of the United States District Courts for the Northern District of Texas. Such party shall file with the Clerk of the Court, serve on the Magistrate and on all parties, written objections, which shall specifically identify the portions of the findings, recommendation, or report to which objection is made and shall set out fully the basis for each such objection. Objections are required to obtain a de novo review by a United States District Judge. Failure to timely file written objections to the proposed findings and recommendation contained in this report shall bar an aggrieved party from attacking the factual findings on appeal. See *Thomas v. Arn*, 474 U.S. 140 (1985) and *Nettles v. Wainwright*, 677 F.2d 404, 408 (Fifth Cir. 1982) (en banc).

Recommended this ____ day of September, 1988.

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J.Q. WARNICK, JR.
UNITED STATES MAGISTRATE